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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DONALD JOE NOWELL, through his Mother and Next Friend Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Petitioners,

v.

UNIVERSAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED

1. Whether Rule 51 of the Federal **Rules** of Civil Procedure may be revised by case law decisions of the various Circuit Courts of Appeal so as to engraft a "plain error" exception or must changes in the Federal Rules of Civil Procedure be **by the rule making authority of the United States Supreme Court only**?

2. If the "plain error" doctrine is valid in civil cases, what standards, judicial tests, principled guidelines should be utilized? Should the rule be asserted **in the first instance** by the reviewing Circuit Court of Appeals; should it be asserted by the reviewing Court of appeals when there are **no related Assignments of Error** or related issues presented in either party's brief; **what degree of "prejudice"** should be required to reverse when "plain error" is asserted; whether the **existence of prejudice** should be probable, palpable, inescapable, or merely **"possible"**; should the party against whom the Court intends to invoke the rule be **accorded the right to brief** or otherwise present his or her point of view in regard to the law and the record **before** the Court makes a decision.

3. Whether "due process of law" prohibits an appellate court from reversing a Judgment on the basis of a "plain error" which was not asserted by the Appellant either by Assignment of Error or in Appellant's Brief and on which the Appellee has had no hearing nor opportunity to brief.

4. Whether the Seventh Amendment prohibits a Circuit Court of Appeals from remanding a case for new trial on all issues when it has upheld the Court's

Judgment and the jury's verdict on all issues except the damage calculation.

5. Whether the "plain error" on which the Fifth Circuit Court of Appeals reversed the case at bar constituted reversible error.

PARTIES TO THE PROCEEDING

Parties:

Donald Joe Nowell, II, by and through his Mother and Next Friend, Pamela Mae Nowell;
Pamela Mae Nowell;
The Estate of Donald Joe Nowell, By and Through Pamela Mae Nowell, Administratrix;
Universal Electric Company;
United States Fidelity and Guaranty Company.

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"NOWELL" OR "PETITIONER" OR "APPELLEE"	These terms are intended to refer to the plaintiffs in the case below which include (1) Donald Joe Nowell, II, a minor, whose suit was brought by and through his mother and next friend, Pamela Mae Nowell, and (2) Pamela Mae Nowell, the widow of Donald Joe Nowell, and (3) the Estate of Donald Joe Nowell, which action was maintained by and through Pamela Mae Nowell, the Administratrix. These parties were the Appellees in the principal appeal and are Petitioners in this Petition for Writ of Certiorari.
"PLAIN ERROR"	Rule of case law which purports to authorize an exception to the contemporaneous objection to jury instruction requirement of Rule 51 of the Federal Rules of Civil Procedure.

"UNIVERSAL" OR "THE DEFENDANT" OR "APPELLANT"	Universal Electric Company was the Defendant below and was the Appellant in the appeal.
"THE OPINION"	This term is intended to refer to the panel opinion of the Fifth Circuit Court of Appeals' on original deliverance in the present case rendered June 25, 1986, See Appendix A-1.

OPINIONS BELOW

On June 25, 1986, the United States Court of Appeals for the Fifth Circuit, filed its opinion **vacating** the District Court **Judgment** awarding Petitioner $1,000,000.00 in damages and **remanded** this case for new trial on the basis of "plain error", involving an unobjected to jury instruction. On **August 25, 1986,** the Court of Appeals **denied** the Petition for **Rehearing** without opinion. On **September 11, 1986,** the Fifth Circuit Court of Appeals granted a **Stay** of Mandate until **October 11, 1986** to allow Petitioner time to file this Petition for Writ of Certiorari.

GROUNDS ON WHICH JURISDICTION INVOKED

Petitioners invoke the **jurisdiction** of the United States Supreme Court, pursuant to 28 U.S.C. § 2101(c), 28 U.S.C. § 1254(1) and Sup. Ct. R. 17.1(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved with related **statutes** and **rules** are as follows:

1 (a) U.S. Const. art. III, § 1, (App. at 50a);

(b) 28 U.S.C. § 331 (Judicial Conference Statute, (App. at 50a);

(c) 28 U.S.C. § 2072 (Rule Making Statute), (App. at 52a);

(d) Fed. R. Civ. P. 51, (Applicable Rule), (App. at 53a);

(e) Fed. R. Civ. P. 1, (Scope and Interpretation of the Federal Rules of Civil Procedure), (App. at 54a);

(f) Fed. R. Crim. P. 30, (App. at 54a);

(g) Fed. R. Crim. P. 52, (App. at 54a);

2 (a) U.S. Const. Amend. VII (Right of trial by jury) (App. at 55a);

(b) 28 U.S.C. § 2072 (Statute reserving common law right of trial by jury), (App. at 55a);

(c) Miss. Const., art. III, § 31, (Right to trial by jury (App. at 56a);

3 (a) U.S. Const. Amend. V (Due Process of Law), (App. at 56a).

(b) Miss. Const., art. III, § 14, (Due Process of Law)(App. at 56a).

The text of the above Constitutional provisions, Statutes and Rules are set forth in the Appendix as indicated.

STATEMENT OF THE CASE

At the Trial Court Level

Invoking the diversity jurisdiction of the United States District Courts, pursuant to 28 U.S.C. § 1332(a) and § 1391(a), the **Plaintiffs filed** civil action for damages for the wrongful death of Donald Joe Nowell against the Defendant, Universal Electric Company in 1982. A pre-trial hearing, at which Plaintiff and Defendant exchanged proposed requested jury instructions, **Record** at 5 (App. at 29a-30a), was held in August of 1984 and six weeks later Plaintiff finally received a **jury trial in October of 1984, Record** at 9 (App. at 30a-31a).

The Defendant, represented by a large and well-respected law firm, (App. at 32a), defended the action at the trial on the basis of contributory negligence and the third-party ("missing defendant") defense and, at least to the extent of obtaining its requested jury instruction, defended on the basis of **comparative**

negligence. Other than requesting the comparative negligence instruction, the Defendant did not defend (for obvious strategy reasons) before the jury on comparative negligence, letting the Plaintiffs carry that burden, Voir Dire at 51 (App. at 47a).

Great expense was incurred by both parties at trial, as well as by extensive pre-trial discovery. The Plaintiffs produced three, highly qualified engineers and medical testimony.

At the instruction conference, Appellant did not object at all to the part of instruction P-8-C that the Court of Appeals later held to constitute "plain error", **Record** at 1057-1059 (App. at 57a-58a) nor to any comparative negligence instruction. Appellant was given the comparative negligence instruction that it requested.

After a six day trial, a **jury** returned a verdict of $1,000,000.00 for the Plaintiffs. It seemed apparent to all parties at the trial level that the **jury** applied the Court's comparative negligence instruction and **had reduced** its verdict on the basis of **comparative negligence.** As a result, **no issue** was raised relating to either comparative negligence or excessiveness of the verdict.

The Defendant filed its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, asserting various errors related to liability and error in various evidentiary rulings. There was no contention or suggestion in either post trial motion in regard to the Court's instructions relating to comparative negligence or comparitive proportionate reduction of damages nor the jury verdict relative to the amount of damages, **Record** at 499 (App. at 40a). The Trial Court overruled both post trial motion.

At the Fifth Circuit Court of Appeals

The Defendant appealed, asserting ten errors in an expanded, seventy-five page Brief. **The Fifth Circuit Court of Appeals, through its panel decision, sustained the trial judge on all ten Assignments of Error, but on its own motion found a "plain error" outside of and completely unrelated to the Appellant's asserted errors, Nowell v. Universal Electric,** 792 F.2d 1310 (5th Cir. 1986) at 6787 (App. at 18a). The Appellant specifically stated in its Brief that the amount of the damage award was not an issue on appeal, (Petitioners' Brief, page 20, App. at 21a).

Although the Fifth Circuit Court of Appeals **found fault only** with the **comparative negligence** instruction (percentage of reduction of damages) aspect of the trial, affirming all instructions, evidenciary matters, and sufficiency of evidence, related to liability, it nevertheless vacated the entire Judgment and remanded for new trial on all issues.

The Fifth Circuit Court of Appeals, based on a **perceived** "plain error", reversed the general verdict **without ever having afforded the Petitioners a right to brief the applicable law or Record** on the points related to the alleged "plain error"; never invited comment; nor even apprised either party before, during or after the oral arguments that it was even considering the subject matter upon which the Court ultimately reversed the general verdict. The Appellees' Petition for Rehearing which would have been Appellees' first hearing on the asserted "plain error", was denied without opinion on August 25, 1986, (Order Denying Petition for Rehearing, App. at 19a).

The Court of Appeals **perceived** an error of **conflicting jury instructions** between the (totally un-

objected to) latter portion of the Plaintiffs' liability instruction and the Defendant's comparative negligence instruction, as set out in its opinion, **Nowell, supra** at 6786-6787, (Apps. at 13a, 14a).

The fact that the opinion was handed down without the assistance or observation of trial counsel or appellate counsel could have been what lead the Court to, incorrectly in our view, believe that **"during closing arguments . . . comparative, proportionate reduction was not mentioned", Nowell, supra at 6788,** (App. at 15a-16a).

> And you want to compare that? Could have been a momentary lapse by Donald Joe. We want to be honest. We're not going to counterpoint that. But stack all of this information up that we have here. Stack up the four professionals at Universal. Stack up this whole five plant companies nationwide and their knowledge and their lack of good policy. It has to be a hundred fold. **So when we get to the proper amount, the right verdict, take a percent off if you have to**

(Plaintiffs' Closing Argument, **Record** at 1018; App. at 48a).

> How would you cut them unless you said Donald Joe was one or ten or five percent negligent. **You could cut them by that percent**

(Plaintiffs' Closing Argument, **Record** at 1028; App. at 48a-49a).

> Contributory negligence: **Donald Joe was partly at fault.** Now, without going into any

> detail, if you first find that they were at fault . . . that is Universal Electric . . . and then you say well, he was one percent, two percent, five percent at fault compared to the negligence of the Defendant, if you do that . . . first of all, **. . . and you've come to your one hundred percent full and adequate compensation. When you say that Donald Joe** was five percent . . if you do, and I don't think you will . . **would you say that you would reduce it by no more**

(Plaintiffs' Voir Dire, **Record** at 51; App. at 47a).

The opinion asserted **failure** to make reference to comparative proportionate reduction in the Closing Argument **as a basis for its decision.**

The Fifth Circuit Opinion invoked "plain error" even though the Fifth Circuit Court of Appeals, as it expressed itself through its opinion, was uncertain that the alleged "plain error" **resulted** in a misguided jury or improper jury verdict, e.g. "inscrutable mystery", "impenetrable uncertainty", "impossible to tell", **Nowell, supra** at 6787; (App. at 14a-15a), and "possible miscarriage", **Nowell, supra** at 6790; (App. at 18a).

The Opinion did not define its authority for invoking "plain error" other than to say it could reverse on the basis of "plain error", citing Fifth Circuit case law as, it is assumed, **a case law revision of Rule 51.**

Plaintiffs/Petitioners will now be required to **undergo** the emotional strain, extreme expense and rigors of a **completely new trial** on all issues and

the **Defendant** will have **another "bite** at the apple" because **the Defendant** failed to follow Rule 51.

REASONS TO GRANT WRIT OF CERTIORARI

Conflict in the Circuits:

The application of the "plain error" **theory** (it can not be called a doctrine, because it has no rules, guidelines, or definite scope) in **civil cases** is simply **not** authorized by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 51. The Ninth Circuit Court of Appeals refuses to follow the "plain error" theory in civil cases at all, **Bock v. U.S.,** 375 F.2d 479 (9th Cir. 1967); **Crespo v. Fireman's Fund Indemnity Company,** 318 F.2d 174 (9th Cir. 1963); **Burtron v. Southern Pacific Company,** 282 F.2d 569 (9th Cir. 1960, cert. den'd 81 S. Ct. 697, 365 U.S. 816, 5 L.Ed. 2d 694); **Hargrave v. Welman,** 276 F. 2d 948 (9th Cir. 1960).

At the other end of the "plain error" scale, the Fifth Circuit follows the theory most liberally both in scope and application, **Nowell, supra** ("plain error" first asserted by appellate court; no trial court objection; not raised as an assignment of error; not briefed by either party); **Shepherd Federal Credit Union v. Palmer,** 408 F.2d 1369 (5th Cir. 1969), (first asserted by the Appellate Court, but supplemental briefs requested from the parties).

Other circuits assert "plain error" occasionally as a reason for reversal but there is **no uniform concept** from circuit to circuit of what "plain error" encompasses, when it should be utilized, or **how** it should be used, **Morris v. Travisono,** 528 F.2d 856 (1st Cir. 1976) (where error has seriously effected the "fairness, integrity, or public reputation of judicial proceedings", "this Court has never reversed a civil case

on this basis"); **Nemrod v. Sylvester,** 369 F.2d 870, 873 (1st Cir. 1966)(only "to prevent a **clear** miscarriage of justice"); **Ouimette v. E. F. Hutton and Company, Inc.,** 740 F.2d 72,76 (1st Cir. 1984)("Rule 51 is binding on both the Court and the attorneys and neither can circumvent it"); **Aspen Highland Skiing Corporation v. Aspen Skiing Company,** 738 F.2d 1509,1516 (10th Cir. 1984) (only if "patently, plainly erroneous and prejudicial"); **Cohen v. Franchard Corporation**, 478 F.2d 115 (2nd Cir. 1973)(while recognizing "plain error", refused to assert it as a grounds for reversal, even when the error related to "important" elements or "significant aspects"). **The circuits are in conflict with one another.**

Departure from Usual Procedure:

As applied in the case at bar by the Fifth Circuit Court of Appeals, the "plain error" theory is a **total departure from the usual course of appellate procedure;** the panel opinion of the Fifth Circuit Court of Appeals **first raised the issue,** perceived by that panel to be a reversible error, in its Opinion **without Petitioners ever having had an opportunity to brief the issue** either as to the applicability of "plain error" or the substantive issue thought by the Fifth Circuit Court of Appeals to constitute reversible error. The parties to the appeal never knew that the Court was considering any issue related to the basis on which the Fifth Circuit Court of Appeals reversed. Petitioners can find **no other reported cases,** even in the Fifth Circuit, which has applied the "plain error" theory in the manner and under the circumstances as it has been applied in this case.

If this procedure is allowed by the United States Supreme Court, might not some Circuit Courts of

Appeal Judges, first asserting unassigned, unbriefed, and wholly new issues, unwittingly, **become advocates of their own intellectual discoveries?**

Constitutional and Other Federal Questions are Presented:

Further, the opinion raises serious federal questions concerning the **rule making process,** federal practitioners' reliance on the Federal Rules of Civil Procedure **as promulgated, Fifth Amendment** due process rights on appeal and, finally, **Seventh Amendment** provisions relating **to retrial of findings of fact by a jury** (the Fifth Circuit Court of Appeals affirmed all assignments of error relating to competence of evidence and liability, but reversed as to all issues).

The panel opinion of the Fifth Circuit in **Nowell, supra** does not state that it required a **higher degree of prejudice prior** to invoking the "plain error" rule as do the Circuits which recognize the doctrine, nor that the "fairness, integrity, or public reputation of the judicial proceedings" had been seriously affected, **United States v. Atkinson,** 297 U.S. 157,159, 56 S. Ct. 391 (1936). It **fails to state any guidelines** or principled test used in its application of the "plain error" doctrine.

The Opinion in the case at bar refers to an "inscrutable mystery", and "impenetrable uncertainty", **Nowell, supra** at 6787, (App. at 14a-15a), and a "possible miscarriage of justice, **Nowell, supra** at 6790, (App. at 18a). Assuming that "plain error", as a judicial doctrine, is valid; assuming that the invocation of "plain error" is within the Circuit Courts of Appeal's **authorized scope of review,** should not the burden be on the side of the invocation of the rule

to show **probability,** not "impenetrable uncertainty"; a universally acknowledged error, not "an inscrutable mystery" and at least a **patent,** rather than a "possible", miscarriage of justice before an Appellate Court should be **empowered** to refer to the "plain error" theory.

ARGUMENT I
IN CIVIL LITIGATION BETWEEN PRIVATE LITIGANTS, RULE 51, AS PROMULGATED BY THE UNITED STATES SUPREME COURT, PROHIBITS APPELLATE REVIEW OF SUSPECTED ERROR RESULTING FROM CONFLICTING JURY INSTRUCTIONS AS TO WHICH NO TIMELY OBJECTION WAS MADE UNDER A "PLAIN ERROR" EXCEPTION BY CIRCUIT COURTS OF APPEAL.

The power to make rules of procedure by Federal Courts rests **exclusively** with the United States Supreme Court, **U.S. Const. art. III, § 1;** 28 U.S.C. § 2072. The method and manner of making those rules and revisions is structured by statutory provision, 28 U.S.C. § 331. There is no provision, no constitutional authority, no statutory authority, no inherent authority for revision or change of the Federal Rules of Civil Procedure in any manner by any other court. This Court has made it clear that (even in the face of contradictory state court rules) lower Courts are "instructed" to follow the Federal Rules, **Hanna v. Plumer,** 326 U.S. 99, 85 S. Ct. 1136 (1945).

There is no room for a "plain error" exception in the language of Federal Rule of Civil Procedure 51 nor is any exception stated in that rule. Further, prescription by the United States Supreme Court "in lieu of general rule-making by other Federal Courts,

is necessary for uniformity", 8A J. Moore, M. Waxner, Moore's Federal Practice ¶ 1.02(a)[2] (2d ed. 1984) at 133.

The Rule regarding the contemporaneous objection requirement is **not the same in Federal criminal procedure.** Criminal Rule 30 is identical to Civil Rule 51 in stating "no party may assign as error the giving or the failure to give an instruction unless he objects thereto. . . .", Fed. R. Crim. P. 30, (App. at 54a). However, Criminal Rule 52(b) specifically incorporates a "plain error" exception, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court", Fed. R. Crim. P. 52(b), (App. at 55a). The greater public concerns as well as due process protection of the accused concerns justify the **difference in the Criminal Rules of Procedure, Atkinson, supra.** The absence of such a "plain error" exception in the Federal Rules of Civil Procedure in the face of the unequivocal and unbending language prohibiting Assignment of Error for failure to object is not by accident or oversight nor without reason for distinction from the Criminal Rules.

This Court in **Atkinson, supra** refused to follow the "plain error" theory in a civil case even though the incorrect instruction was on a controlling issue, the defect in the instruction was **obvious** and the jury's verdict, **patently,** was based on the incorrect instruction. The Court, in that pre-Rule 51 case stated that the Courts of Appeal may notice "plain error" only in exceptional circumstances involving the following: One, either "criminal cases", in the public interest, if the error is "obvious" or, two, "if they (the exceptional circumstances) otherwise seriously af-

fect the fairness, integrity, or public reputation of judicial proceedings", **Atkinson, supra** at 160.

Totally distinguishable from the case at bar, the Supreme Court decision in **City of Newport v. Facts Concerts, Inc.,** 453 U.S. 245, 101 S. Ct. 2748 (1981) although it "hardly could give rise to plain judicial error", **City of Newport, supra** at 256, involved a failure to make contemporaneous objection to a failure to properly instruct the jury at the Trial Court level and therefore must be analyzed.

The most important observation to make in connection with **City of Newport, supra** is that the Appellant raised the issue at the District Court level and the District Court "adjudicated the merits" of the error. Further, the substantive issue involved a "novel" question of **public interest** which was "likely to recur", **City of Newport,** 453 U.S. 245, 101 S. Ct. 2748 (1981). Because the District Court adjudicated the issue, two results occurred. One, it eliminated the "fair and effective trial administration" objectives of Rule 51, **City of Newport, supra** at 248. Secondly, by addressing the issue the District Court **bypassed the "procedural default"** of Rule 51, **City of Newport, supra** at 255,256.

It can hardly be asserted that the Mississippi doctrine of comparative negligence, "comparative proportionate reduction of damages" is a novel issue. Neither can it be asserted that the **amount of damages** awarded to the Plaintiff by the jury amounts to a matter of general public or judicial concern, especially in view of the fact that, not only did the Appellant not raise the question of excessiveness of damages but specifically repudiated that as an issue in his brief, Appellant's Brief at 20 (App. at 23a).

Obviously the Appellant considered the amount of the verdict and consciously determined that it was not excessive and consciously determined not to challenge the amount of damages.

The Supreme Court of the United States is the **only** Court which has the authority to authorize or resort to a "plain error" exception to Rule 51. That rule-making power, it is humbly suggested, must only be exercised in accord with the mechanism set up by 28 U.S.C. § 2072 and 28 U.S.C. § 331.

It is sometimes said that rules are made to be broken. In the school yard that saying is sometimes true and might be appropriate, but in a Court of law, especially the United States Circuit Courts of Appeal, that phrase should never be used nor should rules ever be broken. The Federal Rules of Civil Procedure should only be revised in accordance with the rule-making process.

ARGUMENT II

IF THERE IS TO BE A "PLAIN ERROR" EXCEPTION TO RULE 51, IT SHOULD BE DEFINED AND SPECIFIC RULES DELINEATING WHEN AND HOW IT IS TO BE APPLIED SHOULD BE PROMULGATED.

One of the objectives of the Rules is to "achieve uniformity", **Catapillar Tractor Company v. International Harvester,** 106 F.2d 769 (9th Cir. 1939); 2 J. Moore, J. Lucas, Moore's Federal Practice ¶ 1.13[1] (2d ed. 1984) at 285. As has been seen previously in this Petition for Writ of Certiorari, there is no uniformity of opinion as to what constitutes "plain error", when to apply it or the procedure that should be followed in its application. There are great variances from Circuit to Circuit and from panel to panel

within Circuits as to its scope and application. Indeed, we suggest that it is not capable of being judicially harnessed into a fair and efficient doctrine capable of objective application.

> We believe that two practical problems with basic and fundamental error make it an unworkable appellate procedure. Initially, appellate court recognition of alleged errors not called to the trial court's attention has a deleterious effect on the trial and appellate process. Also, despite its repeated articulation, **the theory has never developed into a principled test,** but has remained essentially a vehicle for reversal when the **predilections of a majority of an appellate court are offended.**

Diliplaine v. Lee High Valley Trust Company, 322 A.2d at 114,116 (PA 1974)(emphasis added by writer).

> Appellate court consideration of issues not raised in the trial court results in the trial becoming merely a dress rehearsal. This process removes the professional necessity for trial counsel to be prepared to litigate the case fully at trial and to create a record adequate for appellate review. The ill-prepared advocate's hope is that an appellate court will come to his aid after the fact and afford him relief despite his failure at trial to object to an alleged error. **The diligent and prepared trial lawyer—and his client—are penalized when an entire case is retried because an appellate court reverses on the basis of an error opposing counsel failed to call to the**

> **trial court's attention.** Failure to interpose a timely objection at trial denies the trial court the chance to hear argument on the issue and an opportunity to correct error. It also tends to **postpone unnecessarily disposition** of other cases not yet tried for the first time.

Diliplaine, supra at 116 (emphasis added by writer).

> The other major weakness of the basic and fundamental error theory is its **ad hoc nature.** The theory has been formulated in terms of what a **particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally applied standard.**

Diliplaine, supra at 117 (emphasis added by writer).

If the "plain error" exception to Rule 51 is to be embraced as a judicial doctrine, there must be **uniformity** as to the **threshold qualifications** of the suspected error, the triggering mechanism. What "exceptional circumstances" warrant a Court of Appeals to refer to "plain error" in the first instance?

There should also be uniformity as to the heightened degree of prejudice required for application. Even in criminal cases "errors in a charge which **may be reversible when properly preserved** pale in the face of the "plain error" doctrine, 8 J. Moore, M. Waxner, Rules of Criminal Procedure, Moore's Federal Practice ¶ 30.04[3] at 30.29 (2d ed. 1984). A far **higher degree of prejudice** is required in order to gain reversal under the "plain error" doctrine, 8 J.

Moore, M. Waxner, Rules of Criminal Procedure, Moore's Federal Practice ¶ 30.04[3] (2d ed. 1984) (citing 1st, 2nd, 5th, 7th, 8th and 10th Cir. cases). That higher degree of prejudice must be defined.

Another purpose of the Federal Rules has been said to be to "narrow the issues and to avoid surprises", **Madden v. Perry,** 264 F.2d 169 (7th Cir. 1959); **Downie v. Powers**, 193 F.2d 760 (10th Cir. 1951); 2 J. Moore, J. Lucas, Moore's Federal Practice ¶ 1.13[1] 2d ed. 1984). To **further narrow** the issues, post-trial motions and assignments of error are required. Ordinarily, during the course of the appeal, briefing and study of the record **further narrows** the issues. The Appellee relies on the Appellant's Assignments of Error and the assertions in the Appellant's Brief to direct his briefing of the law and reference to the Record. Therefore, the Rules and the nature of appeals themselves compel that the issues be not broadened by the Courts of Appeal.

The parties and their attorneys as well as the Trial Judge will have been in attendance at the trial. Each side will have sharply advocated and watched after their rights. They, therefore, are in the best position to know whether they were "prejudiced" by any error. Indeed, parties represented by competent trial lawyers will have left the courtroom literally stinging if they have been wronged by the action of the trial judge or the jury. If neither party feels the smart of an offensive instruction nor prejudice thereby at the trial, or at least by the time that the appeal has been perfected and briefs written, how can the Court of Appeals be in a position to be assured that it is correctly interpreting a suspected error or the "prejudice" produced thereby from a cold Record.

Why should the Courts of Appeal broaden the issues so as to protect one civil litigant against the other or against the results of their own conscious, tactical decisions in purely private settings when "the purpose of this rule (Rule 51) is to 'prevent a litigant from taking advantage of an error which could be rectified by the Court if called to its attention by timely and specific objection", **Aspen Highland Skiing Corporation, supra** at 1514. As this Court has stated "this practice is founded upon considerations of fairness to the Court and to the parties and of the public interest **in bringing litigation to an end after fair opportunity has been afforded to present all issues of law in fact, Atkinson, supra** at 159 (emphasis added by writer).

It is suggested that in the event that this honorable Court determines to authorize a "plain error" exception that it should do so prospectively and should adopt uniform guidelines as to the following: (i) threshold guidelines for the references by the Court of Appeals to the "plain error" theory; (ii) the placement of the burden of showing the existence and extent of "prejudice" (iii) the degree of prejudice to be required; (iv) the extent of the error to be required.

If there are "exceptional circumstances", how "plain" must the "plain error" be? It is suggested that it should be "**patently** and **plainly erroneous** and **prejudicial**", **Aspen, supra** at 1516; **Troupe v. Chicago, Duluth & Georgia Bay Transit Co**, 234 F.2d 253 (2nd Cir. 1956); **Cohen, supra** at 124; **Morris, supra** at 859, with the burden of certainty on the proponent of "plain error". It must be a "generating factor" which resulted in a verdict not warranted

under the law, **Hernden v. Seven Bar Flying Service, Inc.,** 716 F.2d 1322, 1332 (10th Cir. 1983).

Does the panel opinion in the case at bar betray a misapprehension of the higher degree of prejudice and the placement of the burden to show the **existence** of prejudice? The panel decision bases its opinion on unstated analysis and the **absence** of certainty as to prejudice. For example, "impenetrable uncertainty", "inscrutable mystery", "impossible to tell", "possible miscarriage", **Nowell, supra** at 6790 (App. at 18a).

ARGUMENT III
RETRIAL OF ANY FACT-BOUND ISSUE PROPERLY DETERMINED BY A JURY IS PROHIBITED BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE "RULE MAKING" STATUTE

The Seventh Amendment to our Constitution makes it "plain " that the Honorable Fifth Circuit Court of Appeals erred when it vacated the general verdict in **Nowell, supra** and ordered a **new trial on all issues** and did not limit the retrial to the issue of comparative negligence and damages. The Court of Appeals affirmed all matters, findings of fact, and instructions relating to liability and all other matters, except "comparative proportionate reduction" of damages, **Nowell, supra** at 6788 and 6790 (App. at 15a-18a). The Seventh Amendment **commands** that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the Rules of Common Law", U.S. Const. Amend. VII (App. at 55a). The amendment is specifically referred to in the "Rule Making" Statute which reserves the right of trial by jury "as at common law", 28 U.S.C.

§ 2072 (App. at 52a). There being no Federal common law, the applicable common law would be that of the State of Mississippi in this diversity suit.

In a case **directly in point** on retrial of liability issues when there was reversible error relating to comparative negligence instructions only, the Mississippi Supreme Court, as late as June 19, 1986, held that the retrial should be limited to the issues of comparative negligence and damages only, **City of Jackson v. Copeland,** 490 S.2d 834 (Miss. 1986); see also **Rodrigue v. Dixilyn Corp.,** 602 F.2d 537 (5th Cir. 1980).

Because there was no issue of comparative negligence or excessiveness of damages raised by the Appellant, Petitioners have never had the opportunity to be heard on the alternative of reversing for a new trial on the issues of comparative negligence and damages only. After the panel opinion was delivered, your Petitioners sought to be heard on that alternative in its Petition for Rehearing, on page 14, (App. at 24a), and in its subsequent Brief in Support of its Petition for Rehearing, on page 23, (App. at 25a), and by supplemental correspondence dated August 22, 1986, (App. at 27a). However, the Petition for Rehearing was denied without opinion.

In cases, as the case at bar, where the trial court has denied a new trial, the Seventh Amendment prohibition against re-examination of facts determined by a jury is buttressed by the discretion given a trial court's denial of new trial. That discretion will be set aside only for "abuse of discretion", **Faircloth v. Lam-Grays Harbour Co.,** 487 F.2d 685 (5th Cir. 1972). Any Appellate review of a trial court's **denial** of a new trial is thought by text writers to be "a

doctrine of doubtful constitutionality", Wright and Miller, Federal Practice and Procedure § 2819 at 25; see also **U.S. v. Lamb,** 37 U.S. (12 PED.) 1 (1830); **Socono-Vacuum Oil Company,** 310 U.S. 150, 60 S. Ct. 811 (1940).

Retrial of improperly determined issues **only**, as a policy, makes a harmonious union with the dictates of the Seventh Amendment. Interests of judicial economy, uniformity, and reduction of litigation expenses point out the wisdom of the Seventh Amendment command. The first rule of the Federal Rules of Civil Procedure requires that the Rules "be construed to secure the just, speedy, and inexpensive determination of every action", Fed. R. Civ. P. 1, (App. at 54a).

The goal of the Rules have been held to be to "reduce the amount of litigation, to narrow the issues and to avoid surprises", **Madden, supra** and to achieve **simplicity, speed**, and financial **economy** in litigation, **Runkle v. Nong Kimny**, 266 F.2d 689 (D.C. Cir. 1959); **American Fidelity and Gas Co. v. All American Bus Lines**, 342 U.S. 851 (10th Cir. 1951), 72 S. Ct. 79, 96 L.Ed. 642; **Atlantic Greyhound Corp. v. McDonald**, 125 F.2d 849 (4th Cir., 1942); **Gallup v. Caldwell**, 120 F.2d 90 (3d Cir., 1941); **John R. Alley & Co. v. Federal National Bank,** 124 F.2d 995 (10th Cir., 1942); 2 J. Moore, J. Lucas, Moore's Federal Practice ¶ 1.13[1] (2d ed. 1984).

The failure of the Fifth Circuit Court of Appeals' panel opinion to limit the new trial to issues of comparative negligence and damages violates each of the multiple goals of the Rules stated above. It will complicate, lengthen, and make greatly more expensive the final resolution of this litigation.

ARGUMENT IV
VACATING THE JUDGMENT AND SETTING ASIDE THE GENERAL VERDICT IN THE CASE AT BAR ON THE BASIS OF "PLAIN ERROR" AND REMANDING IT FOR NEW TRIAL CONSTITUTED A DENIAL OF DUE PROCESS TO PETITIONERS.

The essential requirements of the Fourteenth Amendment, Due Process Protection "are notice and opportunity for hearing", **Cleveland Board of Education v. Loudermill,** 105 S. Ct. 1487, 1493 (1985) citing **Mulane v. Central Hanover Bank and Trust Company,** 339 U.S. 306, 313, 70 S. Ct. 652,656 (1950). The "root requirement" of the due process clause is "that an individual be given an opportunity for hearing **before** he is deprived of any significant property interest", **Boddie v. Connecticut,** 401 U.S. 371,379, 91 S. Ct. 780,781 (1981)(emphasis in original).

The Fifth Amendment to the United States Constitution is straight-forward. It provides that "no person" shall be "deprived of . . . property, without due process of law", **U.S. Const. Amend. V,** (App. at 56a); see also Miss. Const. art. III, §14 (App. at 56a).

Certainly, Petitioners held a property interest in its Judgment on appeal notwithstanding that it was not final until affirmed. That property interest was subject to ten, but only ten, Assignments of Error. To say that there was no property interest in the Judgment would be to define "property" for Fifth Amendment purposes by the procedure provided for its very deprivation. That procedure being the vacation of the Judgment on an unassigned error, without opportunity to brief the issue nor opportunity for a hearing prior to the opinion. " 'Property' cannot be defined by the procedures provided for its deprivation any

more than life or liberty", **Cleveland Board of Education, supra** at 1493.

Due process is not a fixed nor technical concept operating in a vacuum but one aspect of due process is certain and unchangeable "some form of hearing is required **before** an individual is finally deprived of a property interest", **Mathews v. Eldridge**, 424 U.S. 319,333, 96 S. Ct. 893,902 (1976)(emphasis added by writer).

Although "due process" is not a fixed or rigid concept, this Court has developed a three-factor analysis to assist in the determination of the adequacy of the procedure for due process purposes. This Court has stated that those factors are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the physical and administration burdens that the additional or substitute procedural requirement would entail.

(Id. 335, 96 S. Ct. at 903).

As far as the first factor, the private interest affected, Appellant **never** complained of the alleged error nor its possible "prejudice".

As far as the second factor, the risk of error inherent within the procedure utilized by the Fifth Circuit Panel is great. If the Appellant did not consider that an error was committed in the District Court

nor felt prejudiced thereby, especially when represented by **extremely able counsel**, as was the case here, (App. at 32a), is not the Court of Appeals venturing into a doubtful area. For example, the Court of Appeals in its opinion said that, in utilizing "plain error" the closing arguments of the parties should be considered. The panel **incorrectly** stated that neither party argued comparative negligence nor comparative proportionate reduction of damages in the closing arguments. That is simply not correct as previously pointed out by your Petitioners' Statement of the Case on page seven of this Petition. Petitioners assert that there are other factual and legal oversights that could have been brought to the Court of Appeal's attention prior to its opinion which would have persuaded it not to invoke the "plain error" theory for reversal.

As far as the final factor, to have avoided the unasserted, unbriefed "plain error" issue would have enhanced rather than detracted from any legitimate, Governmental interest in a just, efficient determination and a final end to the litigation. The adversary system and the jury system itself, if allowed, works efficiently and justly. A jury of twelve impartial jurors after six days of trial knew the issues involved thoroughly. They made a unanimous determination based on sound instructions. Appellant made no issue in regard to the jury determination as to the amount of damages nor to comparative negligence at all. Certainly, the provision of, at the very least, a hearing to the Appellees on the unasserted "plain error" prior to the Court's opinion or by a new panel after the opinion would not have adversely affected any legitimate interest of the Fifth Circuit Court of Appeals.

Had Petitioners been afforded the opportunity for a pre-opinion hearing by the Court of Appeals, it would have been pointed out by the Petitioners that there was no error. It would have been pointed out that, by following the instruction, by the Court of Appeals thought to be erroneous, P-8-C and the Defendant's comparative negligence instruction, the jury would have calculated the verdict exactly as is required by the substantive law of comparative negligence. Following instruction P-8-C, the jury would have determined the full compensation then, in the words of the Defendant's instruction, "even though" they had found for the Plaintiffs they would have . . .nevertheless. . .diminish(ed) the amount of damages awarded to the Plaintiffs in proportion to the extent to which Donald Joe Nowell's negligence contributed to the accident".

If the Petitioner, Nowell, had been given a hearing, it would have been pointed out that there were issues of joint tortfeasor negligence and "missing defendant" negligence raised and insinuated during the trial by the Defendants. It certainly could not have been said that the Defendant was entitled to reduction for any contributing negligence of the joint tortfeasors nor because of any contributing negligence of any other party, **Monroe County Electric Power Association v. Pace,** 461 S.2d 739 (Miss. 1984).

This Court has consistently held that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' ", **Mathews, supra,** citing **Armstrong v. Manzo**, 380 U.S. 545,552, 85 S. Ct. 1187,1191 (1965). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may

not involve the stigma and hardships of a criminal conviction is a principle basic to our society", **Joint Anti-Fascist Comm. v. McGrath**, 341 U.S. 123,168, 71 S. Ct. 624,646 (1951). Surely that right applies in the United States Courts of Appeal.

CONCLUSION

There is no place in today's crowded court dockets, extensive discovery and pre-trial preparation, pre-trial hearings and expensive litigation for a "plain error" exception to Rule 51. The Courts of Appeal's duty and **authority** to notice "plain error" in criminal cases of great public interest does not exist in civil cases. Civil litigants, represented by competent counsel of their choice, do not need the Courts of Appeal to find and assert new issues for their protection under a "plain error" doctrine. Special protection of one civil litigant amounts to a denial of equal protection to the other.

Therefore, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted so that this honorable Court may reverse the Court of Appeals and remand with instructions to reinstate the jury verdict or, alternatively, remand with instructions to the Fifth Circuit to permit a hearing on the "plain error" issue and in any event to limit the scope of the Court of Appeals' mandate so as to require a new trial on the issues of comparative negligence and damages only.

Respectfully submitted,

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APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donale Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

v.

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant.

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

OPINION

Filed June 25, 1986

Before: E. Grady Jolly, Robert M. Hill, Circuit Judges, and
Edwin F. Hunter, Jr.*, District Judge.

Opinion by Judge Edwin F. Hunter, Jr.

Appeal from the United States District Court
for the Southern District of Mississippi
Tom S. Lee, District Judge, Presiding

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* District Judge of the Western District of Louisiana, sitting by designation.

SUMMARY

Torts/Courts and Procedure

Appeal from a judgment for plaintiff entered after a jury returned a general verdict. Reversed and remanded.

Appellee Nowell's decedent was seriously injured and later died due to the explosion of a 55-gallon drum he was attempting to modify with an acetylene torch. He had obtained the drum from appellant. Universal Electric Company (Universal). Nowell filed a wrongful death action against Universal, claiming liability for negligence in failing to exercise reasonable care regarding the dangerous condition of the drum, including a failure to warn and failure to eliminate the unreasonable risk of harm posed by the used drums. The jury returned a general verdict of $1 million.

[1] A general verdict is acceptable in a case alleging multiple theories of liability only if each of the several theories is sustained by the evidence and legally sound. [2] If Universal was correct in its assertion that it owed no duty to warn because either the deceased or his employer knew of the danger presented by the drum the court would be compelled to vacate the judgment. [3] But whether or not either of the two men knew of the specific hazard is a question of fact properly submitted to the jury, and the trial judge rightly denied Universal's motion for a directed verdict, and later, for a judgment n.o.v.(j.n.o.v.).

[4] The court did not err by admitting into evidence a safety data sheet and the deposition of a chemist as evidence of the known and foreseeable hazards posed by the drum that exploded. [5] There was no error in the court's charge to the jury that it could consider appellee Mrs. Nowell's remarriage in assessing damages she sustained, as this correctly stated Mississippi law.

[6] A decision to admit evidence under Federal Rule of Evidence 803(24) would be reversed just because the

appeals court would have ruled differently. [7] Using this reason, it is concluded that while the Court of Appeals may not have allowed the double hearsay testimony of Mrs. Nowell that her husband told her after the accident that the barrels came from Universal, it declines to hold its admission represents reversible error.

[8] Because a general verdict was given, it is impossible to tell which of two conflicting propositions of law instructed by the judge was adopted by the jury. [9] Because Universal's objection to the jury charge did not cover the portion that was erroneous he did not meet his contemporaneous objection requirement, and appellant review is precluded unless the error is so fundamental as to result in a miscarriage of justice. [10] However, even when there is a failure to specify an objection to a jury instruction, an appellate court can reverse plain error. [11] The trial judge is encouraged to use special interrogatories on remand. [12] The plain error doctrine error is invoked, the general verdict is set aside and the case is remanded.

OPINION

EDWIN F. HUNTER, JR., District Judge:

Defendant, Universal, appeals from a judgment for plaintiff-appellee entered after a jury returned a general verdict in her favor following an extended trial. Although we have concluded that Universal was not entitled to have the case taken from the jury, we conclude that the trial court's conflicting jury instructions constitute grounds for a new trial. We therefore Reverse and Remand.

BACKGROUND

This diversity suit, controlled by Mississippi substantive law, concerns a suit in which Donald Joe Nowell, the plaintiff's decedent, was seriously injured and subsequently died. The injury and death was caused by the explosion

of a fifty-five gallon drum he was attempting to modify with an acetylene torch. Nowell worked for Wendell Edwards, owner of Edwards Tractor Company, as a mechanic and welder. Edwards occasionally supplied customers with insecticide spray rigs made from emptied drums.

Universal makes small electric motors. All four of its plants regularly purchased 55 gallon drums of Isonel 472, a varnish-like substance which they used to coat or insulate the wires in the manufacturing process. The original supplier of these drums did not require them to be returned. It was necessary for Universal to dispose of empty drums. The day before the accident, Donald Joe asked Edwards to get him some drums to modify into a spray rig for a tractor. Edwards called Harry Reynolds, an employee of Universal and made arrangements for the purchase of three empty drums ($1.50 each). Edwards picked up the drums, loaded them on a truck, and brought them back to his shop. Universal contends that the injury occurred one day later. This is disputed. Universal's receipt to Edwards established that he picked up the drums on April 29, 1981, and the hospital records reveal that Donald Joe was admitted at 10:40 on the morning of April 29, 1981. Several days after the explosion, Edwards disposed of the drum by placing it in a disposal location where it was apparently gathered in by garbage collection. In consequence, it was not available for inspection by either side after the suit was filed. Both Edwards and Mrs. Nowell viewed it on several occasions immediately following the accident. There is evidence in the record that there were other drums in the yards (purchased from others than Universal) that Donald Joe could have been working on at the time of the explosion.

Plaintiffs filed a wrongful death action against Universal, claiming that Universal was liable for negligence in failing to exercise reasonable care regarding the dangerous condition of the drum including a failure to warn and failure to eliminate the unreasonable risk of harm posed

by the used drums. The jury returned a general verdict in the amount of $1,000,000. The trial court entered judgment after denying appellant's post trial motions.

JUDGMENT NOTWITHSTANDING THE VERDICT

Universal insists that the district court erred in denying its motion for judgment n.o.v. In reviewing a denial of judgment n.o.v., we must look at all the evidence in the light and with all reasonable inferences most favorable to the party opposing the motion. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

> [I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied. . . . [I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

[1] Because only a general verdict was returned, our review of the judgment is hampered. In this posture it is impossible to tell which of three theories of liability was adopted by the jury.[1] Plaintiffs argue that it would be inappropriate to enter a verdict for the defendant in consequence of a challenge of error affecting only the duty to warn issue. We do not agree. A general verdict is acceptable in a case alleging multiple theories of liability, only if each of the several theories is sustained by the evidence and legally sound. *Smith v. Southern Airways*,

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[1] The use of a general verdict to probe disparate allegations of negligence and contributory negligence, if properly objected to, would in all likelihood meet with our decisive disapproval. We cannot fault the trial judge. No one objected to the form of submission nor requested special interrogatories directed to the separate issue.

Inc., 556 F.2d 1347 (5th Cir. 1977), *Jones v. Miles*, 656 F.2d 103, 106 (4th Cir. 1981).

[2] Defendant is not correct in his repeated assertions that the "case went to the jury on one theory—negligent failure to warn." Nevertheless, this court would be compelled to vacate the judgment, set aside the general verdict, and grant judgment n.o.v. if defendant is correct in its contention that Universal owed no duty to warn either for the reason that Donald Joe or his employer, Edwards, knew of the danger presented by the drum.

[3] Following the *Boeing* mandate, it is clear that the district court was eminently correct in denying the motion for judgment n.o.v. Whether or not Donald Joe or Edwards had knowledge of the specific hazard and of the particular safeguards which were necessary to avoid the specific risk was a question of fact properly submitted to and resolved by the jury verdict. There is *no evidence* that Donald Joe had ever encountered or had any knowledge of the specific risk associated with the subject drum, viz. an empty drum that had contained Isonel 472 or any similar varnish type substance. In point of actual fact, *what Donald Joe knew was wrong.* Edwards was not a trained technician or otherwise possessed of specialized expertise. Basically, he owned a business with one full time and one part time employee that sold new and used tractors and did repair work. He rarely had occasion to need and use empty drums. We conclude and reiterate that the trial judge rightly denied defendant's motion for a directed verdict and let the issue go to the jury. It follows that the denial of a motion for a judgment n.o.v. was proper. With respect to the judge's denial of a motion for a new trial pegged on the insufficiency of the evidence, we are bound by an "abuse of discretion" standard. In light of the evidence outlined above, we find no such abuse here.

NEW TRIAL

Universal argues that if this court finds (as it has) that substantial evidence supported the jury's verdict, it is entitled to a new trial on the grounds that the district court erred in certain of its charges and evidentiary rulings.

[4] Challenging specific evidentiary rulings, Universal contends that the trial court erred by admitting into evidence the Ashland Safety Data Sheet and the deposition of the Ashland chemist. This contention presupposes that recommendations concerning proper precautions for handling empty drums of xylene, a component of Isonel 472, have no relevant bearing on the safeguards for disposing of an empty drum of Isonel. This supposition is incorrect. The data sheet and the deposition of the chemist were admissible as evidence of the known and foreseeable hazards posed by the drum that exploded. Dr. Ball's testimony to which the defendant also objected addressed recognized safety procedures to be utilized in disposing of empty Isonel 472 or xylene drums and was most relevant.

REMARRIAGE

Plaintiffs filed a motion in limine to exclude any evidence regarding Pamela Mae Nowell Manning's remarriage. Universal responded arguing the motion should be denied due to *Campbell v. Schmidt,* 195 So.2d 87 (Miss. 1967). In *Campbell,* a wrongful death case, the Supreme Court of Mississippi noted:

> [T]estimony showing any change in the conditions on which the suit is based is competent as against the rights of the person or persons affected; therefore, we hold that testimony may be introduced to show the remarriage of the widow, after the death of the husband, for which the suit is brought. *Berner v. British Commonwealth Pac. Airlines,* 230 F.Supp. 240 (S.D.N.Y. 1964); *Ro-*

> *gow v. United States,* 173 F.Supp. 547 (S.D.N.Y. 1959); *Jensen v. Heritage Mut. Ins. Co.*, 23 Wis.2d 344, 127 N.W. 2d 228 (1964).

195 So.2d at 90.

The district judge denied the motion subject to certain reservations, stating:

> The evidence of remarriage will be admissible only on the question regarding the damages recoverable for the loss of contribution to the support of Pamela Nowell and the loss of sex, companionship, services and society for her. The jury will be instructed properly on this issue at the conclusion of the case.
>
> Now, the evidence is not admissible on the matter of the financial needs of the plaintiff or her son.

We now cite pertinent inquiry and response as to the remarriage:

CROSS EXAMINATION

BY MR. BELL:

Q May it please the Court, Mrs. Manning, you have testified that you have remarried since the tragic death of Donald Joe Nowell?

A Yes, sir.

Q What is your present husband's name?

A Wendell Manning.

Q And where do you and he live now?

A We live in Winston County in the Mars Hill Community. It's about fifteen miles out of Philadelphia, towards Kosciusko off of Highway 19.

Q You do live with Mr. Manning now?

A Yes, sir.

Q And your son lives with you and he?

A Yes, sir.

Q What business is he in?

A He is self-employed. He has a sawmill in partnership with another man.

Q And lives in Winston County?

A Yes, sir.

Q Is he making a good husband?

A He's a good man, yes, sir.

Q And is he making a good father for your son?

A Yes, sir.

Q Is he also providing for you and taking care of you?

BY MR. WILLIAMSON:

I object to that. I think it's immaterial what he's earning or not earning.

BY THE COURT:

I'll overrule the objection as to whether or not he is providing for them.

In its charge to the jury—the court stated:

> "You may consider in assessing damage sustained by Pamela Mae Nowell, if any, the fact of remarriage as going to any damages which she might otherwise be entitled to recover."

[5] This charge correctly stated the law of Mississippi as enunciated by its Supreme Court in *Campbell,* and we find no error in this particular.

THE IDENTITY OF THE BARREL

On the same day that Donald Joe was injured, his wife visited him at the hospital. Over Universal's objection, the

trial court admitted the following testimony by Mrs. Manning as to a hearsay statement by Donald Joe made during that visit concerning the identity of the drum that exploded:

> Q (BY MR. WILLIAMSON) Would you describe where, the conditions of it, his condition, your observation of him and what, if anything, was said in regard to the barrels?
>
> A . . . I asked him what happened. And he said that he—that Wendell had called and got the barrels and Wendell had brought them to the shop and he brought the barrels in and he asked Wendell, he said, "Are these barrels clean?" And he said yes. And he said, "Are you sure?" And he said yes . . .
>
> And I said, "Well, Donald, where did they come from?"
> And he said, "From Universal Electric."

Universal insists that Pamela Nowell's testimony was not admissible under Rule 803(24), that its admission was highly prejudicial, and that a new trial is warranted. Plaintiff asserts that the statement was clearly admissible under Fed. R. Evid. 803(24). This is the residual or catch-all exception to the hearsay rule[2] and reads:

> (24) Other exceptions
> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is

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[2] Fed.R.Evid. 803(24) applies whether or not the declarant is available to testify. Fed.R.Evid. 804(b)(5) is an identical rule covering situations where the declarant is unavailable to testify. The language and purpose of both rules is identical and discussion pertaining to one of them is equally applicable to the other. *See* J. Moore 11 Moore's Federal Practice § 803(24)[7] (2d ed. 1982).

> offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Congress believed that the residual exception was necessary to avoid the distortion of the specific exceptions beyond the reasonable circumstances they were intended to include. This exception was designed to protect the integrity of the specifically enumerated exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies. Sen. Comm. on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7065-66; 11 J. Moore *Moore's Federal Practice,* § 803(24)[7] (2d ed. 1982). We recognize that the residual exception must be used sparingly. *United States v. Trevis,* 665 F.2d 616 (5th cir. 1982). We also recognize that a district court has considerable discretion in applying the residual exception which a court of appeals will not disturb absent a definite and firm conviction that the court made a clear error of judgment in weighing the relevant factors. *Page v. Barko Hydraulics,* 673 F.2d 134, 140 (5th Cir. 1982). But we know, too, that both the wording of the Rule and the legislative history indicate that Congress intended evidence to be ad-

mitted under Rule 803(24) only if the reliability of the evidence equals or exceeds that of the other exceptions to the hearsay rule.

There is no doubt the statement was tendered and admitted as evidence of a material fact—the identity of the barrel. This leaves the troubling question: Did Donald's statement and Pamela's repetition of that statement have such equivalent circumstantial guarantees of trustworthiness to make it admissible despite its double hearsay character?[3] Then, too, was the statement more probative on the point for which it was offered than other evidence that plaintiffs did or could procure?

[6] We encountered a very similar problem in *Page v. Barko Hydraulics,* 673 F.2d 134 (5th Cir. 1982). Judge Clark speaking for the panel made this observation:

> "In our opinion it would have been a more precise application of Rule 803(24), and would have best served the interests of justice, Rule 803(24)(C), to exclude the offered statement. However, our standard of review requires more than a judgment that we would have ruled differently and so we decline to hold that the statement's admission was reversible error."

Nevertheless, the Court was careful to note:

> "Because these evidentiary issues will probably recur on retrial, though not in precisely the same context, we emphasize that our rulings today are

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[3] In the present case, Donald Joe Nowell's statement is in response to a direct question from his wife. It is an opinion as to where he believed the drum came from. Nowell did not go to Universal Electric himself and purchase any drums. He had no first-hand knowledge that the drum came from Universal Electric, and did not indicate the basis of his belief concerning the identity of the barrel. If Nowell learned the origin of the drum from his employer, Wendell Edwards, then his statement is double-hearsay and consequently even less trustworthy.

> not precedent for that time. The district court will be free to reconsider these issues anew."

Id., at 140, 141.

[7] The determination of whether a statement is admissible under the residual or catch-all exception to the hearsay rule is one which we recognize is not an easy determination to make. There are no crisp answers. We utilize the *Page* precedent. We may have ruled differently as to the admissibility of Pamela's statement but decline to hold, that its admission constituted reversible error. It goes almost without saying that this evidentiary problem will probably recur on retrial. The District Court is free to reconsider anew and articulate its reasons.

JURY INSTRUCTIONS

Instruction P-8-C was included in the judge's instructions. It *preemptorily sets* forth three possible theories pursuant to which Universal might be negligent.[4] The court then added this language:

> "and if you further find from a preponderance of the credible evidence that Donald Joe Nowell was injured as a proximate result *or contributing result of said negligence* on April 29, 1981 and subsequently died as a result of said injuries on August 28, 1981, it is your sworn duty to return a verdict for plaintiffs in the amount *adequate to compensate the plaintiffs for all damages sustained.*" (emphasis added)

A few pages further on, the record reveals a correct statement of the law:

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[4] The Mississippi Supreme Court recently reversed a jury verdict in a medical malpractice suit, holding that a similar instruction *did not properly submit the issues to the jury and was confusing to them. Trapp v. Cayson,* 471 So.2d 375 (Miss. 1985).

> Even though you believe that the defendant, Universal Electric Company, breached a duty to Donald Joe Nowell which proximately caused or proximately contributed to causing the accident complained of, nevertheless, if you further find by a preponderance of the credible evidence in this case that the action of Donald Joe Nowell constituted negligence which proximately caused or proximately contributed to causing said accident, then it is your sworn duty *to diminish the amount of damages awarded to the* plaintiffs in proportion to the extent to which Donald Joe Nowell's negligence contributed to the accident.

[8] Here, we truly have the inscrutable mystery of a general verdict and the impenetrable uncertainty. The jury was specifically instructed that if Donald Joe was injured *as a contributing result of* defendant's negligence—that it was their sworn duty to return a verdict to compensate plaintiffs *for all damages sustained.* The jury was later instructed as to the effect of dual negligence. The instructions state diametrically opposite propositions of law. It is impossible to tell which theory of damages was adopted by the jury. Had a special interrogatory on contributory negligence been submitted, the error in the charge might have been localized permitting the verdict to stand.

[9] Defendant pursuant to the Rule 51 contemporaneous objection requirement did note his objection to the P-8-C charge, but the objection was based on the assertion that "it did not correctly state the law that would be applicable in this case." The objection was not precisely to that portion of P-8-C that was clearly erroneous to the effect that if Universal's negligence was a proximate contributing result of said negligence that the award should be for all damage sustained. Failure to particularize the objection precludes review by this court unless the error is so fundamental as to result in a miscarriage of justice. *Farrar v. Cain,* 756 F.2d 1148, 1150 (5th Cir. 1985).

[10] No one can question that even where there has been a failure to specify an objection to a jury instruction, an appellate court may reverse for plain error. This court has often found and based its decisions on plain error. *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980); *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976); *Industrial Development Board of Town of Section, Ala. v. Fuqua Industries, Inc.*, 523 F.2d 1226 (5th Cir. 1975), *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969); *Chagas v. Berry*, 369 F.2d 637 (5th Cir. 1966), *cert. denied*, 389 U.S. 872, 88 S.Ct. 161, 19 L.Ed.2d 154 (1967); *Mondshine v. Short*, 196 F.2d 606 (5th Cir. 1952); *Dowell, Inc. v. Jowers*, 166 F.2d 214 (5th Cir. 1948); *see generally*, 9 C. Wright and A. Miller, Federal Practice & Procedure § 2558, p. 672 (1971).

When reviewing the district court's charge, we are bound to consider the instructions as a whole, the evidence presented, and the arguments of counsel to determine whether the error is so fundamental as to result in a miscarriage of justice. The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide, and second, it is impossible after the verdict to ascertain which instruction the jury followed. The jury requested a copy of the instructions. The judge, utilizing his discretion, declined the request. Which instruction did the jury follow? Did they find defendant's negligence was a contributing cause of the accident and award plaintiff *all* damages? Did they find damages of 3 million and reduce it to one million on the basis of contributory negligence? The conflict we perceive is not one of semantics or linguistic preferences but is one which cuts to the heart of the issues of comparative and contributory negligence and the effect of each. The effect of a conflicting instruction is to nullify a correct one. During the closing arguments of counsel, the issue of the effect of joint negligence and comparative proportionate reduction was not mentioned by

either party although the record is replete with evidence to sustain both.

The trial court permitted Pamela to be questioned as follows:

Q. (BY MR. WILLIAMSON) Would you describe where, the conditions of it, his condition, your observation of him and what, if anything, was said in regard to the barrels?

A. . . . I asked him what happened. And he said that he—that Wendell had called and got the barrels and Wendell had brought them to the shop and he brought the barrels in and asked Wendell, he said, "Are these barrels clean?" And he said yes. And he said, "Are you sure?" And he said yes. And he said he laid the drum down and lit his torch and he was sitting astraddle of it and he lit his torch, and he said he had the torch up and he was fixing to go into the barrel and something just told him, said, "You need to check those barrels again." And so he laid his—or he proceeded to lay the torch down and he said before he knew what happened that the drum had exploded. . . .

When questioned during cross-examination, Mrs. Manning testified as follows:

Q. (BY MR. BELL) Wasn't the statement you made to us then to the effect that Donald Joe said that he was not going to trust Wendell again?

A. Oh, no, sir, he didn't say he wasn't going to trust Wendell again. He said that he wasn't going to cut on a barrel again without making sure himself, he wasn't going to ask anybody and depend on their opinion of it, he was going to make sure himself. He would never ask again, he would never depend on anybody else's giving him an answer of whether they were clean or not.

Q. So Donald Joe did know that the barrel is supposed to be clean before it is cut on, didn't he?

A. Yes, sir.

[11] Special interrogatories under Fed.R.Civ.P. 49(a) are helpful to a jury because they reduce an otherwise complex trial to its simplest and most important issues. The genuine issues are distilled and an appellate court is often aided immeasurably when it is called on to review the case. In short, special interrogatories make both a jury and a reviewing court so much the wiser and so much less confused. See *Ware v. Reed* 709 F.2d 345, 355 (5th Cir. 1983). We encourage the district court to consider the use of special interrogatories with an appropriate general charge in submitting this case to the jury on retrial.[5]

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[5] *Petes v. Hayes,* 664 F.2d 523, 525 n.2 Special interrogatories are authorized by Fed.R.Civ.P. 49(a), which provides in pertinent part:

> *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. "We have on many occasions requested, begged, pleaded with, urged, and ordained the district courts to employ this handy and workable device." *See Petes v. Hayes,* 664 F.2d 523, 525 n.2 (5th Cir. 1981); *See also Mixon v. Atlantic Coast Line R.R. Co.,* 370 F.2d 852 (5th Cir. 1966); *Weymouth v. Colorado Interstate Gas Co.,* 367 F.2d 84 (5th Cir. 1966); *American Oil Co. v. Hart,* 356 F.2d 657 (5th Cir. 1966); *Travelers Ins. Co. v. Hart,* 356 F.2d 657 (5th Cir. 1966); *Travelers Ins. Co. v. Busy Electric Co.,* 294 F.2d 139 (5th Cir. 1961). *See also John R. Brown, Federal Special Verdicts: The Doubt Eliminators,* 44 F.R.D. 338 (1967).

Here, we decline to perpetuate by reason of the Rule 51 contemporaneous objection requirement a possible miscarriage of justice resulting from two diametrically conflicting instructions. We invoke the plain error doctrine—vacate the judgment, set aside the general verdict, and remand for new trial consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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FILED

AUG 25, 1986

ON PETITION FOR REHEARING
(AUGUST 25, 1986)

Before JOLLY and Hill, Circuit Judges, and HUNTER, Senior District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-titled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E GRADY JOLLY
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX III
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4128 - Nowell -vs- Universal Electric
USDC # CA E82 0094 "L"

MANDATE STAYED TO AND INCLUDING OCTOBER 11, 1986

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ EILEEN C. BOUDOIN
Deputy Clerk

Enclosures

cc: Mr. Thomas A. Bell
Mr. William Roberts Wilson, Jr.
Mr. Edward A. Williamson
Mr. Glenn F. Beckham

APPENDIX IV

* * * *

PROPOSITION VI: (*SEE* ORIGINAL BRIEF AT 56-58).

Appellees argue that this issue is one regarding *excessiveness* of damages and cannot be successfully asserted by appellant since this issue was not briefed, yet appellant has challenged the *evidentiary* ruling regarding an *element* of damage which should *not* have been considered by the jury. *Excessiveness of damages was not raised by appellant and therefore, not briefed.*

* * * *

APPENDIX V

* * * *

B. *CLARIFY:* IN ANY EVENT, A NEW TRIAL ON ALL ISSUES IS UNNECESSARY. A NEW TRIAL ON DAMAGES ALONE IS TOTALLY CONSISTENT WITH THIS COURT'S OPINION.

As previously noted, this Court found no error in the trial below on the challenges of error raised by Universal which concerned the issue of their liability for negligence. In view of this fact, it would be offensive to the tandem and related objectives of "justice" and "judicial economy" to order a new trial on the question of Universal's liability. This issue has been resolved as a question of fact decided by the jury and twice affirmed in post-trial review. Courts favor the finality of decisions.

In any and all event we implore the Court to limit the subject of any new trial to the issue of damages alone. Such an order would be completely consistent with the holding in this Court's Opinion based, as it was, solely on the

* * * *

APPENDIX VI

* * * *

III. IN ANY EVENT, THE COURT SHOULD MODIFY AND/OR CLARIFY ITS MANDATE SO AS TO ADOPT ALTERNATIVE PROCEDURES IN THE COURT BELOW RATHER THAN ORDER A NEW TRIAL ON ALL ISSUES.

As we have noted on several occasions, neither the propriety of the jury's verdict, nor the actions of the district court concerning the issue of liability are affected by the conflict in the court's charge dealing with (or omitting) the comparative effect of Donald Joe's own negligence on the determination of the amount of compensation. As a supplement to the argument and authorities contained in Nowell's original Petition requesting that this Court modify and/or clarify the terms of its mandate, we offer the following: See, *Indamer Corp. v. Crandon,* 217 F.2d 391 (5th Cir. 1954); *Cromling v. Pittsburg & L.E.R. Co.,* 327 F.2d 142, 152-153 (3rd Cir. 1963); *Dazenko v. James Hunter Mach. Co.,* 393 F.2d 287 (7th Cir. 1968); *Rodrigue v. Dixilyn Corp.,* 602 F.2d 537, 544 (5th Cir. 1980); *Freid v. McGrath,* 135 Fed. 833, 77 U.S. App. D.C. 385 (1943). Note that in the *Rodrigue* case, the court remanded the case for a new trial solely for the purpose of *assessing damages* even though the plaintiff did not even get a verdict in the court below. *Id.*, at 544.

CONCLUSION

It is respectfully submitting that this Court erred in that portion of its Opinion in which he applied the "Plain Error" rule to certain portions of the trial court's jury charge. This Court should withdraw that portion of its Opinion and affirm the district court.

Failing that, this Court should grant this Application for Rehearing and provide such other and further relief as is

necessary to provide the Nowells with a due process hearing on the "Plain Error" exception issue.

APPENDIX VII

August 22, 1986

Honorable Gilbert F. Ganucheau
Clerk of the United States Court
of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, LA 70130

RE: NOWELL VS. UNIVERSAL ELECTRIC
NO. 85-4128

Dear Mr. Ganucheau:

Pursuant to FRAP 28(j), we are bringing the Court's attention to the hereinafter cited Mississippi Supreme Court case rendered before, but appearing in the Southern Reporter after the Brief on Petition for Re-Hearing was submitted to this Court. *City of Jackson v. Copeland,* 490 S.2d 834 (Miss. 1986) is cited for the proposition that in the event that this case is reversed it should be remanded for new trial on only two issues. The contributory negligence, if any, of the Plaintiff and the amount of damages; it would have been cited on page 24 of Appellee/Petitioner's Brief.

Thanking you for your receipt of this and with the very highest regards, I am,

Sincerely,

EDWARD A. WILLIAMSON

EAW:dkh

cc: Honorable Thomas Bell
Honorable Robert Addison

Honorable Glen Beckham
Honorable Francis Hare, Jr.

APPENDIX VIII

Plaintiff		Defendant	Docket No E82-009
DONALD JOE NOWELL, II, ET AL		UNIVERSAL ELECTRIC COMPANY	
08-07-84	218	Defendant's Motion to Compel Production, with attachments and cert. of service, filed.	
08-07-84	243	Defendant's Motion to Compel Answers to Interrogatories, with cert. of service, filed.	
08-07-84	262	Defendant's Motion to Compel Answers to Defendant's First Requests for Admission and Related Interrogatories, with attachments and cert. of service, filed.	
08-07-84	285	Notice of hearing above motions before Magistrate John M. Roper, in Biloxi, Ms., at 9:00 a.m. on 8-24-84, with cert. of service, filed.	
08-13-84	287	Defendant's Motion for Protective Order, with cert. of service, together with notice of hearing before Judge Roper on August 24, 1984, in Biloxi, Miss. filed.	
08-16-84	300	Plaintiff's Supplemental Answers to Interrogatories, with cert. of service, filed.	
08-20-84	304	Plaintiff's response to motion to Compel Production, with cert. of service and attachments filed.	
08-20-84	324	Plaintiff's Response to Motion to Compel Answers to Interrogation with cert. of service with attachments, filed.	
08-21-84	337	Supplemental Discovery, with cert. service, filed.	
08-23-84	348	Plaintiff's Supplement to Discovery, with cert. of service, filed.	
08-27-84	355	Defendant Universal Manufacturing Company's Supplemental Answers to Plaintiffs' First Set of Interrogatories, with cert. of service, filed.	
08-27-84	360	Defendant Universal Electric Company's Supplemental Answers to Plfts' Supplemental Interrogatories, with cert. of service, filed.	
08-29-84	364	Return on Deposition Subpoena executed as to Velvet Johnson 8-27-84, filed.	

08-29-84	365	Return on Deposition Subpoena executed as to Allen Cowling 8-27-84, filed.
08-31-84	366	Further response to Request for Admissions, with cert. of service, filed.
08-31-84	372	Supplemental Answers to Interrogatories, with cert. of service, filed.
09-05-84	405	Deputy Clerk's Sheet: Pre-Trial 15 minutes in Meridian, Miss. before Judge Roper on *Aug. 31, 1984.* ACTION TAKEN: PTO to be submitted within 5 days. *Instructions submitted.* 4-5-day trial. Attys request definite setting second week. Conflict on the 17th, due to prior setting. filed.
10-22-84	483	EXHIBITS: P-1 thru P-36; D-1 thru D-5. Trial Oct, 16, 17, 18, 19, 22, 1984. filed.
10-22-84	487	Jury Verdict "*We, the jury, find for the plaintiffs, Donald Joe Nowell, II by and through his mother and next friend, Pamela Mae Nowell,* Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Nowell, Administratrix, against the defendant Universal Electric Company and assess the damages in the amount of $1,000,000, filed.
10-25-84	488	Deputy Clerk's Sheet: Trial 33 hrs and 30 mins. in Meridian, Ms., Judge Tom S. Lee presiding Court Reporter Carol Winstead, on Oct. 15, 16, 17, 18, 19, 22, 1984. ACTION TAKEN: Rule invoked; 10-19-84, 8:40 a.m., plfts. rest; motion of deft. for directed verdict, overruled, but will consider the theory of liability at time of instructing jury; 10-22-84, plfts. motion to deny deft's right to put on any more experts, agreed to by deft. 9:20 a.m. deft. rests, plfts. rest. Renewed motion for directed verdict, overrruled. Jury retired at 4:25 p.m. to deliverate and returned verdict at 9:45 p.m. Wilson Taylor, foreperson. Jury found for plfts, in amount of $1,000,000. Judgement to be submitted, filed.
10-29-84	489	ORDER: That said jury be kept together in the custody of court personnel and that said Court personnel make proper provisions and for said jurors' meals at the expense of the United States until such time as they shall have reached a verdict, or are otherwise discharged, filed and entered O.B.1984, 1042. TSL. 10-22-84

10-31-84	491	MEMORANDUM OPINION AND ORDER: that plaintiffs' motion for Summary Judgement is denied, and judgment shall be entered accordingly on the jury verdict in favor of plaintiff's intervenor, filed and entered O.B.1984, pages 1049-1050 TSL.10-20-84. (copies mailed attys).
11-5-84	493	Bill of Costs in the sum of $1,359.52, filed.
11-26-84	497	JUDGMENT: that plft's Donald Joe Nowell, II, by and through his mother and next friend, Pamela Mae Nowell, Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix, be and they are hereby granted a judgment against the deft. Universal Electric Company, in the sum of One Million dollars ($1,000,000,00) together with interest and costs in this cause for all of which let execution issue. An order adjudicating the reasonable costs of collection and providing the distribution of said costs of collection to plft's attys. the sum of $216,085.49 to the United States Fidelity and Guaranty Company and the balance to plfts. shall be entered hereafter, filed and entered O.B.1984, pages 1100-1101. TSL. 11-21-84. (copies mailed attys).
11-26-84		FINAL JS 6 card.

APPENDIX IX

DANIEL, COKER, HORTON AND BELL

A PROFESSIONAL ASSOCIATION

SUITE 600, 111 CAPITOL BUILDING
P.O. BOX 1084
JACKSON, MISSISSIPPI 39205
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General Civil, Trial and Appellate Practice in State and Federal Courts. Agribusiness, Antitrust, Commercial, Communications, Construction and Surety, Corporation Energy Allocation and Contract, Environmental Insurance, International Trade, Personal Injury, Trade Regulation and Workers Compensation Litigation.

JOE H. DANIEL, born Daniel's Landing, Tennessee, October 17, 1917; admitted to bar, 1940, Mississippi; 1972, U.S. Supreme Court. *Education:* University of Mississippi; University of Mississippi Law School (J.D., 1940). Phi Delta Phi. Author: "Comments on Mississippi's Counterclaim Statute," 1953. *Member.'* Hinds County (President, 1958-1959) and American Bar Associations; Mississippi State Bar (President, 1973-1974); Mississippi Defense Lawyers Association; International Association of Insurance Counsel; Federation of Insurance Counsel; Defense Research Institute, Inc. Fellow, American College of Trial Lawyers. [Maj. U.S.M.C., 1941-1946]

CURTIS E. COKER, born New Albany, Mississippi, September 30, 1918; admitted to bar, 1952, Mississippi; 1976, U.S. Supreme Court. *Education:* University of Utah (B.S., 1950); University of Mississippi (J.D., 1952). Phi Alpha Delta. Executive Vice President, Jackson School of Law, 1959-1975. *Member:* Hinds County and American Bar Associations; Mississippi State Bar (President 1982-1983); Mississippi Defense Lawyers Association; Federation of In-

surance Counsel; Defense Research Institute, Inc. Fellow, American College of Trial Lawyers.

FRANK C. HORTON, born Grenada County, Mississippi, July 13, 1917; admitted to bar, 1941, Mississippi. *Education:* Millsaps College and University of Mississippi (B.A., 1941); University of Mississippi (J.D., 1941). Phi Delta Phi. District Attorney, Fifth Judicial Circuit District, 1950. Attorney Referee, Mississippi Workmen's Compensation Commission, 1955-1958. *Member,* Hinds County and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association. [Maj., U.S.A.F., 1942-1946]

THOMAS A. BELL, born Grenada, Mississippi, January 1, 1922; admitted to bar, 1949, Mississippi; 1972, U.S. Supreme Court. *Education:* University of Mississippi (B.A., 1949; J.D., 1949). Phi Alpha Delta. County Prosecuting Attorney, Grenada County, 1950-1952. Municipal Judge, City of Grenada, 1956-1962. President, Grenada County Bar Association, 1958. Instructor, Jackson School of Law, 1962-1976: *Member:* Hinds County, Federal and American Bar Associations; Mississippi State Bar (Commissioner, 1962); Mississippi Defense Lawyers Association (President Elect, 1983; President, 1984-1985); Defense Research Institute, Inc.; International Association of Insurance Counsel [Lt., Col. U.S. Army JAGC, ret., 1942-1969]

JOHN B. CLARK, born Laurel, Mississippi, September 6, 1942; admitted to bar, 1966, Mississippi; 1976, U.S. Supreme Court. *Education:* Millsaps College and University of Mississippi (B.A., 1963); University of Virginia (LL.B., 1966). Phi Kappa Phi; Phi Alpha Delta. Law Clerk to U.S. Circuit Judge James P. Coleman, 1966-1967. *Member:* Hinds County and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association (Vice President, 1980-1981).

FORREST W. STRINGFELLOW, Lucedale, Mississippi, October 24, 1940; admitted to bar, 1970, Mississippi; 1979, U.S. Supreme Court. *Education:* Gulf Coast Junior College

(A.A., 1963); University of Mississippi (B.A., 1965); Jackson School of Law (LL.B., 1969). Phi Theta Kappa; Sigma Delta Kappa (Secretary, 1967-1968). *Member:* Hinds County and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association; American Judicature Society.

THOMAS H. SUTTLE, JR., born Jackson, Mississippi, August 12, 1941; admitted to bar, 1971, Mississippi, *Education:* Mississippi State University (B.A., 1963); University of Mississippi (J.D., 1971). Blue Key; Omicron Delta Kappa; Phi Delta Phi. Chairman, Moot Court Board, 1971. *Member:* Hinds County and American Bar Associations; Mississippi State Bar; American Judicature Society [Capt., U.S., Army Field Artillery, 1963-1968]

DONALD V. BURCH, born Niagara Falls, New York, February 18, 1944; admitted to bar, 1970, Mississippi. *Education:* Vanderbilt University (B.A., 1966); University of Alabama (J.D., 1969) Sigma Delta Kappa. Law Clerk to Justice L.A. Smith, Jr., Mississippi Supreme Court, 1969-1970. *Member:* Hinds County and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association.

JACKSON H. ABLES, III, born Vicksburg, Mississippi, December 3, 1946; admitted to bar, 1975, Mississippi; 1982, U.S. Supreme Court. *Education:* University of Mississippi (B.A., 1969; J.D., 1975). Phi Delta Phi (Magister, Mayers Inn). Associate Editor, Mississippi Law Journal, 1973-1975. *Member:* Hinds County, Federal and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association. [Lt., USN, 1969-1972]

J. PRICE COLEMAN, born Memphis, Tennessee, July 22, 1950; admitted to bar, 1975, Mississippi. *Education:* University of Mississippi (B.B.A., 1971; J.D., 1975). Phi Delta Phi. Staff, Mississippi Law Journal, 1973-1975. *Member:* Hinds County and American Bar Associations; Mississippi

State Bar; Mississippi Defense Lawyers Association; National Association of Railroad Trial Counsel.

C. MICHAEL ELLINGBURG, SR., born Indianola, Mississippi, January 27, 1951; admitted to bar, 1976, Mississippi. *Education:* Hinds Junior College and Millsaps College (B.S., 1973); University of Mississippi (J.D., 1976). Phi Delta Phi. Staff, Mississippi Law Journal, 1974-1976. *Member:* Hinds County and American Bar Associations; Mississippi State Bar.

TERRY R. LEVY, born Pascagoula, Mississippi, June 11, 1952; admitted to bar, 1977, Mississippi. *Education:* University of Mississippi and University of Southern Mississippi (B.A., 1973); University of Mississippi (J.D., 1977). Phi Eta Sigma; Pi Gamma Mu; Phi Kappa Phi; Phi Delta Phi. Member, Moot Court Board, 1976-1977. *Member:* Hinds County and American Bar Associations; Mississippi State Bar

B. STEVENS HAZARD, born West Point, Mississippi, August 13, 1951; admitted to bar, 1976, Mississippi; 1981, U.S. Supreme Court. *Education:* Mississippi State University (B.A., 1972); University of Mississippi (J.D., 1976). Phi Alpha Delta. Staff, Mississippi Law Journal, 1975-1976. Co-Author: "Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals," 47 Mississippi Law Journal 1437, 1976. Law Clerk for Justice Stokes vs. Robertson, Mississippi Supreme Court, 1976-1977. *Member:* Hinds County and American Bar Associations; Mississippi State Bar; Mississippi Defense Lawyers Association.

ROBERT S. ADDISON, born Magnolia, Mississippi, April 19, 1953; admitted to bar, 1978, Mississippi. *Education:* University of Southern Mississippi (B.M.E., with honors, 1974); University of Mississippi (J.D., 1978). Phi Alpha Delta; Pi Gamma Mu; Phi Eta Sigma. Chairman, Moot Court Board; Member, National Mock Trial Team, 1977-1978. *Member:* Hinds County and American Bar Associa-

tions; Mississippi State Bar; Mississippi Defense Lawyers Association.

LARRY D. MOFFETT, born Starkville, Mississippi, July 1, 1954; admitted to bar, 1979, Mississippi. *Education:* University of Mississippi (B.A., 1976; J.D., with honors, 1979). Phi Delta Phi (Magister, Mayers Inn). Research Editor and Special Projects Editor, Mississippi Law Journal, 1978-1979. Author: "Recent Decision," 48 Mississippi Law Journal 1113, 1977. *Member:* Hings County and American Bar Associations; Mississippi State Bar.

GARY K. JONES, born Armory, Mississippi, December 13, 1955 admitted to bar, 1980, Mississippi. *Education:* Mississippi State University (B.S., with highest distinction, 1977); University of Mississippi (J.D., 1980). Phi Kappa Phi; Omicron Delta Kappa; Phi Delta Phi. Research Editor, Mississippi Law Journal, 1978-1979. Author: "Commerical Law Section of 1978 Mississippi Supreme Court Review," 50 Mississippi Law Journal 41, 1979, *Member:* Hinds County and American Bar Associations; Mississippi State Bar.

J. WYATT HAZARD, born West Point, Mississippi, March 2, 1956; admitted to bar, 1981, Mississippi. *Education:* Mississippi State University (B.S., 1978); University of Mississippi (J.D., 1981). Delta Theta Phi. Member, Moot Court Board. *Member:* Hinds County Bar Association; Mississippi State Bar.

BRENDA B. BETHANY, born Jackson, Mississippi, November 16, 1954; admitted to bar, 1980, Mississippi. *Education:* Mississippi State University (B.S., with distinction, 1975; M.Ed., 1976); University of Mississippi (J.D., with honors, 1980). Phi Kappa Phi; Phi Delta Phi. Member, 1979-1980 and Research Editorial 1980, Mississippi Law Journal. Co-Author: "Miscellaneous Section of 1979 Mississippi Supreme Court Review." 50 Mississippi Law Journal 833, 1979. Law Clerk for Hon. Neville Patterson, Chief

Justice, Mississippi, 1980-1981. *Member:* Mississippi State Bar.

ROY ALLEN SMITH, JR., born Clarksdale, Mississippi, November 27, 1955; admitted to bar, 1982, Mississippi. *Education:* University of Mississippi (B.A., 1977; J.D., 1982). Delta Theta Phi. President, University of Mississippi Law School Student Body, 1981. *Member:* Hinds County and American Bar Associations; Mississippi State Bar: Jackson Young Lawyers.

TIMOTHY E. HURLEY, born Ft. Worth, Texas, November 29, 1957; admitted to bar, 1983, Mississippi. *Education:* College of William & Mary (B.A., 1980); Marshall-Wythe School of Law (J.D., 1983). Executive Editor for Research, William & Mary Law Review, 1982-1983. *Member:* Mississippi State Bar.

MICHELE STAPLETON, born Warner Robins, Georgia, February 26, 1956; admitted to bar, 1981, Alabama; 1983, Mississippi. *Education:* Auburn University (B.A., with high honors, 1978); University of Alabama (J.D., 1981). Phi Kappa Phi; Omicron Delta Kappa. Member: Mortar Board; Bench and Bar. Member, Editorial Board, Alabama Law Review, 1979-1981. Law Clerk: to Judge L.T. Senter, Jr., U.S. District Judge, Northern District of Mississippi, 1981-1983; to Judge Richard L. Holmes, Alabama Court of Civil Appeals, 1983-1984. *Member:* Mississippi State Bar; Alabama State Bar.

DEBRA M. ROBBINS, born Jackson, Mississippi, August 4, 1959, admitted to bar, 1984, Mississippi. *Education:* Mississippi State University (B.S., 1980); Mississippi College School of Law (J.D., 1984). Associate Editor, Mississippi College Law Review, 1983-1984. *Member:* Mississippi State Bar; Jackson Young Lawyers.

CLINTON M. GUENTHER, born Greenwood, Mississippi, August 15, 1955; admitted to bar, 1981, Mississippi. *Education:* University of Mississippi (B.A., summa cum laude,

1977); Mississippi College (J.D., with distinction, 1981). Omicron Delta Kappa; Phi Kappa Phi; Phi Alpha Delta. Co-Chairman, Moot Court Board, Appellate Division, 1980-1981. Recipient, American Jurisprudence Award, Estate and Gift Taxation. *Member:* Leflore County, Hind County and American (Member, Tax Division) Bar Associations Mississippi State Bar; Jackson Young Lawyers.

JONATHAN B. FAIRBANK, born Hattiesburg, Mississippi, June 8, 1958; admitted to bar, 1984, Mississippi. *Education:* University of Southern Mississippi (B.A., 1980); University of Mississippi (J.D., 1984). Phi Delta Phi. Recipient, American Jurisprudence Award in Corporations, Insurance and Federal Jurisdiction. Note Editor, Mississippi Law Journal, 1983-1984. Co-Author: "Supreme Court Review, Criminal Law.," 54 Mississippi Law Journal, 1983. *Member:* Mississippi State Bar.

S. MARK WANN, born Jackson, Mississippi, August 31, 1960; admitted to bar, 1985, Mississippi. *Education:* Millsaps College (B.A., magna cum laude, 1982); University of Mississippi (J.D., 1985). Phi Delta Phi. Member, 1983-1985 and Special Projects Editor, 1984-1985, Mississippi Law Journal. Author: "Securities Regulation—Rule 106-5—Duty of Tippee to Disclose Information or Abstain From Trading Arises Only When Information Source Owes Shareholders A Fiduciary Duty," 53 Mississippi Law Journal 667, December, 1983. Member of Republican Executive Committee of Rankin County, Mississippi, 1980-1984. *Member:* Mississippi State Bar; Jackson Young Lawyers.

SILAS W. MCCHAREN, born West Point, Mississippi, June 6, 1956; admitted to bar, 1985, Mississippi. *Education:* Millsaps College (B.A., 1979); University of Mississippi (J.D., 1985). Phi Alpha Deita; Order of Barristers. Chairman, Moot Court Board, 1984. *Member.* Mississippi State Bar; Jackson Young Lawyers Association (Member, Legal Line Committee, 1985).

TRUDY D. FISHER, born Yazoo City, Mississippi, June 14, 1960; admitted to bar, 1985, Mississippi. *Education:* Mississippi University For Women (B.S., 1982); University of Mississippi (J.D., 1985). Phi Delta Phi. Casenote Editor, 1983-1984, Editor-in-Chief, 1984-1985 and Assistant Editor, 1984, Mississippi Law Journal. *Member:* Mississippi State Bar; Jackson Young Lawyers.

REPRESENTATIVE CLIENTS: Allianz Insurance Co.; Allianz Versicherungs; American Poultry International Ltd.; Bankers and Shippers Insurance Company of New York; Bituminous Casualty Corp.; CIGNA Insurance Cos.; Clay Broadcasting Corporation of Mississippi, Inc.; Coco-Cola; Commercial Union Group; CUNA Mutual Insurance Society; Degussa Corp; Dickerson-Chapman, Inc.; Electric Power Associations of Mississippi; Federated Mutual Implement and Hardware Insurance Co.; Fireman's Fund Insurance Cos.; General Accident Group; Georgia-Pacific Corp.; Hartford Accident and Indemnity Co.; Houston General Insurance Co.; International Harvestor; Liberty Mutual Insurance Co.; Maryland Casualty Co.; Masonite Corp.; Mississippi Chemical Corp; Mississippi Livestock Producers Assn.; Morrison Assurance Co.; Munford, Inc.; Progressive Casualty Insurance Co.; Safeco Insurance Co.; Schering-Plough Corp.; Security Insurance Group; Self Insurer Service, Inc.; Sentry Insurance Co.; Sheller-Globe Corp.; Selmens-Allis Corp.; Southeast Mississippi Livestock Farmers Association; Transamerica Insurance Group; Travelers Insurance Co.; TRW Inc.; Wausau Insurance Cos.; Zurich-American Insurance Co.;.

APPENDIX X

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

CIVIL ACTION NO. E-82-0094(L)

DONALD JOE NOWELL, JR., II, etc., *et al.*
Plaintiffs

and

UNITED STATES FIDELITY AND GUARANTY COMPANY
Plaintiff/Intervenor

VS.

UNIVERSAL ELECTRIC COMPANY
Defendant

FILED

NOV 27 1984

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW Universal Electric Company, defendant herein, by and through its attorneys of record, and respectfully moves the Court to set aside the verdict entered in this action and the judgment entered thereon, and to enter for this defendant a Judgment Notwithstanding the Verdict and in accordance with the defendant's Motion for a Directed Verdict, made at the conclusion of the plaintiffs' evidence and renewed at the conclusion of all testimony and evidence, or, in the alternative, an order for a New Trial, and, in support thereof would show unto the Court as follows:

I.

That the testimony and evidence on behalf of the plaintiffs entered herein was totally insufficient to allow the jury to find that this defendant was guilty of any negligent act whatsoever which was a proximate cause of the injury to Donald Joe Nowell.

II.

That the evidence offered by the plaintiffs herein to establish that this defendant breached any duty which it owed to Donald Joe Nowell was insufficient to support a verdict for plaintiffs.

III.

That the verdict of the jury was contrary to and completely inconsistent with the law and can only be the result of confusion and/or sympathy.

IV.

That the verdict of the jury was contrary to the overwhelming weight of the credible evidence and was based upon speculation, conjecture and surmise.

V.

That the Court erred in not sustaining defendant's Motion for a Directed Verdict on the grounds assigned at the time such motion was made at the conclusion of plaintiffs' evidence and at the conclusion of all of the evidence, such grounds being incorporated by reference herein for every purpose.

VI.

That the jury failed to follow the instruction of the Court that it should return a verdict for the defendant if plaintiffs

failed to prove by a preponderance of the credible evidence that the barrel on which Donald Joe Nowell was working at the time of his injury was one of three sold to Wendell Edwards by Universal Electric Company.

VII.

That the jury failed to follow the instruction of the Court that it should return a verdict for the defendant if it found that Donald Joe Nowell was aware, or in the exercise of reasonable care should have been aware, that the drum on which he was working at the time of his accident should have been properly cleaned before being cut with an acetylene torch.

VIII.

That the jury failed to follow the instructions of the Court that Universal Electric Company owed no duty to Donald Joe Nowell to warn him of any dangers of the drum in question which were known or should have been known to Donald Joe Nowell or which were open and obvious and should have been known to Donald Joe Nowell in the exercise of reasonable care and that it should return a verdict for the defendant if Donald Joe Nowell was aware that the drum in question should have been cleaned before being cut with an acetylene torch.

IX.

That as a matter of uncontradicted fact, Wendell Edwards, the employer of Donald Joe Nowell at the time of his injury, was acutely aware of any and all dangers associated with the three drums purchased from Universal Electric Company and knew that the drums would have to be steam cleaned before being cut with an acetylene torch and as a matter of law, this knowledge on the part of Wendell Edwards was imputed to his employee, Donald Joe Nowell and since these facts are uncontroverted on

the record, this case should not have been submitted to the jury.

X.

That as a matter of law, Universal Electric Company owed to no duty to Donald Joe Nowell since it did not deal with Donald Joe Nowell and only had contact with Wendell Edwards, who selected the drums for his own purposes, knowing full well all dangers presented by the empty drums and Universal Electric Company relied upon Wendell Edwards to impart this knowledge to any employee asked to cut the drums with an acetylene torch.

XI.

That as a matter of law, Universal Electric Company owed no duty to Donald Joe Nowell to warn him that the drum in question should be cleaned before being cut into since the evidence is undisputed that Donald Joe Nowell was an excellent welder and was well experienced with a torch in safety matters and stated to both his wife and Ronald Nowell on the date of the accident in question that before going any further with the cutting process that he had decided that he had better look inside the barrel and make sure that it was cleaned out, and since these facts were uncontroverted on the record, the case should not have been submitted to the jury.

XII.

That the trial court committed substantial prejudicial error in admitting certain hearsay evidence offered by the plaintiffs, to-wit, the testimony of Mrs. Pamela Nowell (Manning) that Donald Joe Nowell told her that Wendell Edwards told him that the barrel that injured him came from Universal.

XIII.

That the trial court erred in granting plaintiffs' instruction number P-8-C and in denying defendant's instruction number D-5; P-8-C being an erroneous statement of the applicable law and amounting to a peremptory instruction for the plaintiffs and D-5 being an instruction imputing Wendell Edwards' knowledge of the dangers inherent in the barrels to Donald Joe Nowell, his employee.

XIV.

That viewing all the evidence in the light most favorable to the plaintiffs, there is but one reasonable conclusion as to the proper judgment, that is one in favor of the defendant.

IN THE ALTERNATIVE, and in further support of its Motion for a New Trial, the defendant Universal Electric Company, would respectfully show the following:

I.

The verdict of the jury is contrary to the law.

II.

The verdict of the jury is contrary to the overwhelming weight of the evidence.

III.

That the evidence in this case is totally insufficient to establish any liability on the part of this defendant to the plaintiffs and there is an absolute absence of evidence to sustain the verdict of the jury.

IV.

That the verdict of the jury is not supported by any substantial evidence.

V.

That the verdict of the jury is so excessive that it clearly evidences bias, passion, prejudice and sympathy on the part of the jury.

VI.

That the trial court committed substantial prejudicial error in admitting certain hearsay evidence offered by plaintiffs and excluding evidence of life insurance offered by defendant.

VII.

That the verdict was the result of jury confusion caused by erroneous and conflicting instructions, the submission of non-issues of fact for decisions and the procedural inability of the Court to enlighten the jury during deliberation concerning instructions, testimony and issues raised by the jury.

WHEREFORE, PREMISES CONSIDERED, relying upon the record and proceedings in this action, and in accordance with the basis as shown in defendant's brief supporting the herein motions, attached hereto as Exhibit "A" and incorporated herein by reference, the defendant respectfully moves for a Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial on each and all of the grounds hereinabove set out.

Respectfully submitted,

UNIVERSAL ELECTRIC COMPANY

BY: /s/ THOMAS A. BELL
ITS ATTORNEY

BY: /s/
ITS ATTORNEY

DANIEL, COKER, HORTON AND BELL, P.A.
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
(601) 969-7607

CERTIFICATE

I, Robert S. Addison, attorney for Universal Electric Company, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial to Edward A. Williamson, Esq., P.O. Box 579, Philadelphia,

APPENDIX XI

Jury Voir Dire

* * * * *

be so in this case too—will say "contributory negligence": Donald Joe was partly at fault. Now, without going into any detail, if you first find that they were at fault—that is, Universal Electric—and then you say, "Well, he was one percent, two percent, five percent at fault compared to the negligence of the defendant," if you do —that First of all, just having the instruction won't mean that he was, of course. That's generally claimed. But even though that's the case, will you say—let's say you have come to your—you find liability, and you've come to your 100 percent full and adequate compensation. When you say that Donald Joe was five percent—if you do, and I don't think you will—would you say that you would reduce it no more than five percent?

MR. BELL: Your Honor, that's not a proper argument at all at this time.

THE COURT: Its not. Objection sustained.

MR. WILLIAMSON: Let me rephrase it totally, then, Your Honor. Would you only consider comparative negligence in the way of whatever it may be, if it is comparative—and compare it with any negligence on the part of the defendant? Would you do that? Would each of you do that?

We have asked, I think, for in excess of $2,000,000 actual damages. Now, does that fact there alarm anybody? Is that just automatically too much money to ask for? If the damages are there and the liability is there to your satis-

APPENDIX XII

Plaintiffs' argument

* * * *

Joe Nowell." It's just as plain as the nose on your face. It's in black and white. "Empty drums should not be given to individuals." They didn't give it; they made a buck. "Properly disposed of by certified firms." Xylene. And they want to say they didn't know? Oh, look. Look at this information that they had. And you want to compare that? Could have been a momentary lapse by Donald Joe. We want to be honest. We're not going to counterpoint that. But stack all this information up that we have here. Stack up the four professionals at Universal. Stack up this whole five plant companies nationwide and their knowledge and amount, the right verdict, take a percent off if you have to. I don't think this man did anything but what was humanly predictable.

George Arender said, "I'm the safety man. Yeah, I was in charge. No, I didn't follow him from the explosive room to the stack. I just kind of figured it would get safe somehow or another." He contradicted his testimony. I don't think he was mistaken about some things. He said, though, that he didn't read this little ole print. How do you expect Donald Joe to read it if the man who puts it on there—He didn't even remember—The man who put it on didn't even

* * * *

in a metal thing, that's not unreasonable.

Safety within reason is all we've ever asked for. We were told to do this. George Arender said, "We could have done it and it would have eliminated this hazard." Could have done it in 10 minutes easy, and made it perfectly safe.

Now, ladies and gentlemen, we've got three people today who are not—two of whom are not here and not able to speak. Three lives. They want you to cut damages, they say. Here's what I ask. Let see what we can do. $2,000,000, $2,500,000 is a lot of money. I know that. So let's see what we can cut.

Okay. Medical bills. Can we cut medical bills, $205,000? Is there any rational way to cut them? How would you cut them unless you said Donald Joe was one or ten or five percent negligent. You could cut them by that percent, I guess. But if you don't—if you agree with me and don't think you ought to cut it, how do you rationally cut it? I don't see any way that you can cut the medical and funeral bills. They have to be paid, $205,000 worth.

Then the least significant things, the loss of earnings, 342 or 332—It's an estimate. It doesn't assume that he would ever obtain a higher skill level or make more money. It doesn't assume also that he would have gotten sick and never made any more. I don't know what you're going to do with that. That's an estimate. We just gave you a guide-

* * * *

APPENDIX XIII

The full text of the Constitutional and statutory provisions involved, as well as the Rules are as follows:

(1)(a) 'U.S. Const. art. III, § 1

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

(1)(b) 28 U.S.C. § 331

> The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.
>
> The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to Section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia

circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The conference is authorized to exercise the authority provided in Section 372(c) of this title as the Conference, or through a standing committee. If the conferences elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and

subpoenas duces tecum issued on behalf of the United States or an officer of any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.

The Conference shall also carry on a continuous study of the operation and effect of the **general rules of practice and procedure now or hereafter in** use **as prescribed by the Supreme Court for the other courts of the United States** pursuant to law. Such **changes in and additions to those rules as the** conference may deem desireable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay **shall be recommended by the Conference** from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

(1)(c) 28 U.S.C. § 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process,

writs, pleadings, and motions, and the **practice and procedure** of the district courts **and courts of appeals** of the United States in civil actions, including admiralty and maritime cases and appeals therein, and the practice and procedure in proceedings for the review by the Courts of Appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such **rules shall not abridge,** enlarge or modify any substantive right and shall **preserve the right of trial by jury** as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been **reported to Congress by the Chief Justice** at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(1)(d) F.R.C.P. 51

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court

shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(1)(e) F.R.C.P. 1

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

(1)(f) Fed. R. Crim. P. 30

A defendant who fails to object to erroneous jury instructions at trial pays a heavy price for his omission when raising his objection on appeal. Errors in a charge which **may be reversible when properly** preserved pale in the face of the plain error doctrine. As noted above, alleged errors in instructions, or, failures to strictly comply with Rule 30 usually do not mandate reversal absent prejudice to the defendant, even when properly preserved. A far higher degree of prejudice is required in order to gain reversal under the plain error doctrine, where errors of omission, inclusion, and formulation are rendered harmless.

(1)(g) Fed. R. Crim. P. 52

(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

(2)(a) U.S. Const. Amend. VII

In suits at common law, where the value ind-controversy shall exceed twenty dollars, the **right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined** in any Court of the United States, than **according to the rules of the common law.**

(2)(b) 28 U.S.C. § 2072

The **Supreme Court shall have the power to prescribe by general rules,** the forms of process, writs, pleadings, and motions, and the practice and **procedure of the district courts and courts of appeals** of the United States in civil actions, including admiralty and maritime cases and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall **preserve the right of trial by jury** as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(2)(c) Miss. Const., art. III, § 31

The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

(3)(a) U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of** life, liberty, or **property, without due process of law;** nor shall private property be taken for public use, without just compensation.

(3)(b) Miss. Const., art. III, § 14

No person shall be deprived of life, liberty, or property except by due process of law.

APPENDIX XIV

* * * * *

MR. BELL: Yes, You Honor. We have an exception to P-8C, which was designated that at the top of the page. The exception that I will make to it is that this instruction is apparently being based on Section 388 of the *Restatement of Torts (Second)*, and I feel that it does not correctly state the law that would be applicable to this case. First I say that it doesn't apply to Universal under the facts of this case; secondly, that the number two point there that refers to failing to completely and adequately warn and instruct, that this fails to take in account that warnings are only necessary when an individual needs the warning and that it doesn't take into consideration the knowledge that Wendell Edwards or Donald Joe Nowell already had. And likewise, there has to be a showing—for any warning to be even necessary, there has to be a showing that there has been some reliance on that warning or lack thereof; and there is no evidence whatsoever before the Court that there was any reliance on any warranty or warning or anything made by Universal.

I believe that the third portion of that, which is designated the fourth portion of it, almost puts an obligation of having to make the barrel—to make it completely safe, and even to the point where it would destroy its usefulness. I don't think that that's a proper statement of the law either, so I would object to this.

THE COURT: For the benefit of the record, this is the instruction—Of course, it's not numbered in the instruction, but this is the instruction setting out the alleged acts of negligence by the plaintiff; and that which counsel referred to as number four is a paragraph to the following effect: by failing to eliminate the hazard of explosion by destroying the barrels, cutting the top out of the barrels,

or by cleaning the barrels, if you find such is negligence. Do you have any other objections to the instructions?

MR. BELL: No, sir. That's all.

THE COURT: Do you request any additions to the instructions as given?

MR. BELL: Yes, Your Honor. We would request Instruction Number D-5. We think that that's an applicable—that it is an accurate statement of the law in the state of Mississippi concerning the imputation of knowledge and that the knowledge of Wendell Edwards is imputed to Donald Joe Nowell, and we would request this instruction.

THE COURT: The Court is of the opinion that this Instruction Number D-5 is an overstatement and does not correctly state the law. I'm making it refused and having it handed to the court reporter for insertion in the record.

[Same is attached at the end of this transcript.]

THE COURT: Mr. Marshal, would you get the injury, please.

MR. BELL: Your Honor, it might be presumptive on my part, but we do have an alternate there to be taken care of.

THE COURT: I'm going to excuse him right [illegible].

[Jury In]

THE COURT: Mr. Edward Lavelle Phillips, you are

* * * *

Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-593

In The
Supreme Court of the United States
October Term, 1986

DONALD JOE NOWELL, through his Mother and Next Friend Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Petitioners,

v.

UNIVERSAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

All interested parties are identified in the petitioners' brief, with one exception: The liability insurance policy covering Universal Electric Company in this case was issued by Employers Insurance of Wausau, a Mutual Company, and a member of the Wausau Insurance Companies Group. The parent organization of the Wausau Insurance Companies Group is Nationwide Insurance Companies.

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No. 86-593

In The

Supreme Court of the United States

October Term, 1986

DONALD JOE NOWELL, through his Mother and Next Friend Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Petitioners,

v.

UNIVERSAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

CITATION TO THE OPINION DELIVERED BELOW

Nowell v. Universal Electric Co., 792 F.2d 1310 (5th Cir. 1986) *reh'g denied*, No. 85-4128 (August 25, 1986)

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provisions listed in petitioners' brief, the following constitutional provisions, statutes and rules are involved in this case:

28 U.S.C. § 2111

Miss. Code Ann. § 11-7-15 (1972)

Fed. R. Evid. 103(d)

Sup. Ct. R. 34.1(a)

The texts of these provisions are set forth in the Appendix.

———o———

STATEMENT OF THE CASE

With due deference to the petitioners' statement of the case, respondent suggests that the Fifth Circuit's opinion will provide the Court an adequate background for considering the issue before the Court: Should certiorari be granted? From that opinion respondent would emphasize that Instruction P-8-C, the *only* substantive instruction granted from those submitted by petitioners, *was objected to* by respondent, albeit on grounds other than the one relied upon by the panel when it *remanded the case for a new trial.* Furthermore, this Court should note that *petitioners did not argue below* (in their petition for rehearing, *see* Appendix at App. 8-9) that a plain error exception to Rule 51 did not or should not exist or even that it is not uniformly applied; instead, they simply argued that the doctrine did not apply to this case.

REASONS TO DENY THE WRIT OF CERTIORARI

1. The Court Of Appeals' Decision Contemplates Further Proceedings.

Finding error in the *only* substantive instruction granted plaintiffs, the court of appeals reversed and remanded the action to the district court for a completely new trial. Ordinarily, an order granting a new trial is viewed as interlocutory in nature; therefore, it is not immediately appealable absent extraordinary circumstances. *Allied Chemical Corp. v. Daiflon,* 449 U.S. 33, 34 (1980). Since the expressed preference of this Court is to avoid piecemeal litigation by reviewing only "final orders," *see, e.g., O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Laclede Gas Light Co. v. Public Service Commission,* 304 U.S. 398 (1938); and *Slaker v. O'Connor,* 278 U.S. 188 (1929); and since there is no important national policy that would be frustrated by a denial of Supreme Court review at this juncture, certiorari should be denied.[1]

Furthermore, review at this time could be a waste of the Supreme Court's limited resources, for if a verdict more favorable to petitioners is obtained upon retrial of the action, petitioners will no longer complain that the court of appeals erred. Since it is not the policy of this Court to decide abstract, hypothetical or contingent questions or to address constitutional issues in advance of the

---

[1] As petitioners admit in their petition for certiorari, at page 12, "[i]t can hardly be asserted that the Mississippi doctrine of comparative negligence, 'comparative proportionate reduction of damages' is a novel issue. Neither can it be asserted that the *amount of damages* awarded to the Plaintiffs by the jury amounts to a matter of general public or judicial concern. . . ." (Emphasis in original.)

necessity for their decision, *see Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the better course would be to deny certiorari pending the retrial of this entire matter in the district court.

2. The Conflict Between The Circuits To Which The Petitioners Allude Is A False Conflict.

Petitioners allege that there is a conflict between the Ninth Circuit and the remaining circuits on the plain error issue, with the Ninth Circuit steadfastly refusing to apply the plain error exception to civil cases. However, in a decision more recent than the four cases petitioners cited in their brief, the Ninth Circuit admitted that the doctrine has validity in that circuit. *See Brown v. Avemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979). In fact, in a footnote to the opinion the court gave a list of *seventeen* cases in which the court "found technical noncompliance with Rule 51 but [nevertheless] proceeded to evaluate the merits of the appeal." *Id.* at 1374-75 & n.4. Accordingly, the alleged conflict upon which petitioners rely does not in fact exist.

Furthermore, petitioners contend that in circuits other than the Ninth, the plain error exception is not uniformly applied. However, as is addressed in greater detail in Arguments I and II, *infra*, at 6-16, for at least the last fifty years, the Supreme Court has provided the appeals courts definite and fixed guidelines for applying the exception. Since application of the doctrine requires a subjective determination and a full review of the record, and *as each case necessarily turns on its own facts*, respondent respectfully suggests that *perfect uniformity* of application would be difficult, if not impossible, to achieve. However, since

the cases cited in both briefs indicate that the various circuits are applying the same standards, as promulgated by this Court, respondent submits that as much uniformity as is practicably possible is being achieved and that the intervention of this Court is not required.

3. The Decision Of The Court Of Appeals Does Not Conflict With A Decision Of This Court Or Depart From The Accepted And Usual Course Of Judicial Proceedings.

See Argument II, *infra* at 10-16.

4. The Instant Appeal Does Not Present An Important Issue Of Federal Law, But Instead Is Concerned With The Proper Application Of The Mississippi Comparative Negligence Statute.

See note 1, *supra* at 3.

Furthermore, it is noteworthy that *nowhere* in petitioners' brief do they quarrel with the Fifth Circuit's findings that Instruction P-8-C obviously misstated Mississippi comparative negligence law and that such error seriously affected Universal's substantive rights under the comparative negligence statute.

5. None Of The Arguments Raised By The Petitioners Merit Review.

See Arguments I-IV, *infra* at 6-23.

———o———

ARGUMENT I

Plain Error Is A Valid And Long-Established Doctrine Of Appellate Review.

Petitioners' argument that there is not a valid judicially-developed plain error doctrine in civil practice borders on the ridiculous.[2] Probably the most often cited case dealing with plain error concerned a civil jury instruction. *See, e.g., United States v. Atkinson,* 297 U.S. 157 (1936). *Atkinson* was decided fifty years ago—two years prior to the enactment of Rule 51—and the frequency with which it is still cited today certainly attests to its continued validity. *See, e.g., United States v. Young,* 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985); *United States v. Frady,* 456 U.S. 152, 163 n.13 (1982).

The inherent authority of a court to address plain error is an important aspect of civil and criminal appellate review. Although the doctrine's use is more widespread in the criminal context and the criminal rules specifically address plain error, *see* Fed. R. Crim. P. 52(b), authority for it is also found in various enactments which apply with equal force to civil cases, *see, e.g.,* 28 U.S.C. § 2111;

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[2] It is interesting to note that in their "Petition for Rehearing or in the Alternative a Petition for Modification of the Court's Mandate," *see* Appendix at App. 8-9, petitioners *conceded* that a plain error exception to Rule 51 existed. In that brief petitioners concentrated their energies on trying to convince the appeals court that the instruction did not constitute plain error, *see id.;* petitioners have not taken that tactic in this court. Likewise, the *amicus curiae* brief filed on rehearing by the Mississippi Trial Lawyers Association assumed that a plain error doctrine existed and argued that there was no plain error in this case and that the exception was applied in an overly broad manner. *See* Appendix at App. 10.

Fed. R. Evid. 103(d); Sup. Ct. R. 34.1(a). Furthermore, the most important testament to the continued validity of the doctrine in the civil context is the regularity with which it has been invoked to allow the United States Supreme Court to reach important issues not raised by the parties to the litigation. *See, e.g., Erie R.R. v. Tompkins,* 304 U.S. 64, 82 (1938) (application of state substantive law in diversity cases; dissent criticized majority for considering an issue not raised below or presented by the petition). *See also City of Oklahoma v. Tuttle,* 471 U.S. 808 (1985) (interpretation of Section 1983; jury instruction reviewed despite the defendant's admitted failure to object at trial); *United States v. Frady,* 456 U.S. 152, 166 n.15 (1982) (habeas corpus proceeding; "plain error" applicable to review of court's Section 2255 hearing); *Procunier v. Navarette,* 434 U.S. 555, 559 n.6 (1978) (scope of constitutional protection for prisoner's mailing privileges; even if issue not "fairly comprised" by the issues presented in the petition for certiorari, Court's power was not limited by the precise terms of the questions presented); *Connor v. Finch,* 431 U.S. 407, 421 n.19 (1977) (redistricting decision; Court has "authority and duty in exceptional circumstances to notice federal court errors to which no exception was taken, when they 'seriously affect the fairness, integrity or reputation of public judicial proceedings.' "); *Washington v. Davis,* 426 U.S. 229, 238 (1976) (appeals court applied incorrect legal standard under Title VII; "Although the petition for certiorari did not present this ground for reversal, our Rule 40(d)(1)(2) provides that we 'may notice a plain error not presented'; and this is an appropriate occasion to invoke the Rule."); *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 320 n.6

(1971) (collateral estoppel; while the Court is not required to decide questions not raised in a petition for certiorari, this does not limit the Court's power to decide important questions raised by the parties); *Hormel v. Helvering,* 312 U.S. 552, 556-58 (1941) (tax appeal; Court affirmed appeals court's authority to pass on questions not presented below); *Sibbach v. Wilson & Co.,* 312 U.S. 1, 16 (1941) (Rule 35 medical examination; contempt order overturned on "a plain error of such fundamental nature" that the Court should notice it); *cf. City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256, & 257 n.15 (1981) (failure to object to jury instruction allowing punitive damages against a municipality under Section 1983; Court acknowledged a plain error exception to Rule 51 and applied a modified plain error standard of review to an unsettled issue of federal law).

Nevertheless, petitioners have insisted that there is simply "no room for a 'plain error' exception" to Rule 51, *see* petition at 10, thereby encouraging a practice of rigid adherence to the contemporaneous objection requirement. However, a similar policy of rigid adherence to court rules was squarely rejected by this Court in *Hormel v. Helvering,* 312 U.S. 552, 555-58 (1941) (emphasis added) in an analogous context:

> Petitioner in effect challenges the power of the Circuit Court of Appeals to pass upon any questions other than those which were directly and squarely presented in the proceedings before the Board of Tax Appeals. . . .
>
> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to

issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Court of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. *See Blair v. Oesterlein Mach. Co.*, 275 US 220, 225, 72 L.Ed. 249, 252, 48 S.Ct. 87.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. And examination of the cases relied upon by petitioner discloses that this Court, in following in some cases the general principle sought to be invoked here by petitioner, has been careful to point out the circumstances justifying application of the practice in the particular case. . . . These decisions and

> others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.

Cf. United States v. Young, 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985) ("The plain error doctrine of Federal Rule Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous objection requirement.") (Footnote omitted).

The plain error exception to the contemporaneous objection rule is well recognized, despite the unexplained failure of the drafters of the Federal Rules of Civil Procedure to specifically include a provision to that effect in Rule 51. Accordingly, there is no basis for granting the writ on this issue.

ARGUMENT II

Sufficiently Specific Rules Have Been Delineated To Govern How And When The Plain Error Doctrine Should Be Used And These Rules Were Properly Applied In This Case.

Despite petitioners' suggestion that the standards for invocation of the plain error doctrine are not sufficiently established, *Atkinson* very clearly delineated the relevant factors:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and

> of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. . . .
>
> [However,] [i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, *if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.*

297 U.S. at 159-60 (emphasis added). These standards have been reaffirmed by the Supreme Court on numerous occasions, *see, e.g., United States v. Young*, 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985); *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977); *Silber v. United States*, 370 U.S. 717, 718 (1962); *Johnson v. United States*, 318 U.S. 189, 200 (1943). The plain error standard has also been alternatively defined in terms of errors of a "fundamental nature," *see, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); and errors "on a vital phase of the case and affect[ing] the substantial rights" of the aggrieved party. *See United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 412 (1947). As stated recently in *United States v. Young*, 470 U.S. 1, — n.14, 84 L.Ed.2d 1, 13 n.14, 105 S.Ct. 1038, — n.14 (1985),

> federal courts have consistently interpreted the plain error doctrine as requiring an appellate court to find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice. To do otherwise could well lead to having appellate courts indulge in the pointless exercise of reviewing "harmless plain er-

> rors''—a practice that is contrary to the draftman's intention behind Rule 52(b), see n 12, supra, and one that courts have studiously avoided and commentators have properly criticized. . . .

Despite these well-defined standards, which have been repeatedly applied by the courts, *see* cases cited in Argument I, *supra,* petitioners contend that this Court should outline a four-part test for prospective application in plain error cases. Assuming for the sake of argument that the four specific guidelines suggested by the petitioners in their brief are not already embodied in the plain error case law,[3] it is doutbful that more or different rules for the application of the plain error doctrine would be helpful. Furthermore, if formulated, it is questionable whether they could be policed by this Court on a case-by-case basis with any reasonable degree of success.

First of all, a court's decision to term an error ''fundamental'' is an individual, subjective one; since it is based upon the particular facts of that case, the decision is one that usually cannot be accurately predicted. *See* 10 J. Moore & H. Bendix, *Moore's Federal Practice* ¶ 103.41 (2d ed. 1985). For this reason it is questionable whether standards different from or more detailed than those already in use would be of help to the courts.

Second, since each case necessarily turns on its own facts, a decision to term an error as ''plain error'' requires a review of the entire trial court record. *See, e.g.,*

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[3] Petitioners argue that the case law does not contain adequate guidelines for application of the doctrine, yet oddly enough for each "additional" guideline petitioners urge, they are able to identify a specific reported decision in which the guideline has already been applied. *See* petition at 17-18.

United States v. Young, 470 U.S. 1, —, 84 L.Ed.2d 1, 13, 105 S.Ct. 1038, — (1985) ("[W]hen addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. . . . It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means."); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974). This need to review the entire record would put an extreme burden on this Court if it attempted to engage in case-by-case review of appeals court's plain error determinations. As Justice Brennan pointed out recently in his dissent to *United States v. Young*, 470 U.S. 1, —, 84 L.Ed.2d 1, 24-25, 105 S.Ct. 1038, — (1985) (Brennan, J., dissenting) (emphasis added), it is simply not practical for the Supreme Court to make individual plain error decisions without the waste of valuable judicial resources:

> Our traditional practice has been to leave fact-bound questions of possible prejudicial error to the lower court on remand. . . . Two important considerations undergrid this practice. First, the function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. *Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the application of law to the particularized facts of individual disputes—one of the functions performed quite capably by the federal courts of appeals.* This allocation of responsibilities can result in subtle but vitally important differences in institutional outlook, differences that should not be shortcut simply because a majority decides the evidence of a particular defendant's guilt

is "overwhelming" and "established beyond any doubt whatever." Ante, at —, 84 L.Ed. 2d —.

Second, if the Court is to be evenhanded in its willingness to review lower courts' plain-error and harmless-error determinations, we will be required to undertake such analyses with ever-increasing frequency. Yet this Court simply is not institutionally capable of conducting the sort of detailed record analyses required in properly administering the plain-error and harmless-error doctrines.

> This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. . . . As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to [the] defendant were not affected by the alleged error. And it is an insult to the Court of Appeals to imply, as the Court does today, that it cannot be trusted with a task that would normally be conducted on remand.

United States v. Hastings, 461 U.S. 499, 516-517, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (Stevens, J., concurring in judgment).

For these two reasons, the changed standards petitioners urge are simply not workable and would be of questionable utility.

Returning to the standards clearly set forth in *Atkinson* and the Court's other cases, a review of the most recent Fifth Circuit plain error civil decisions indicates that the Fifth Circuit is dutifully applying the standards set by this Court. *See, e.g., Haas v. Atlantic Richfield*, 799 F.2d 1011, 1016-17 (5th Cir. 1986) (failure to give

instruction on employer fault not plain error; instructions given on comparative fault not plain error); *Middleton v. Harris Press & Shear, Inc.*, 796 F.2d 747 (5th Cir. 1986) (no plain error; answers to special interrogatories indicated that erroneous instruction was harmless); *Hale v. Cotton Petroleum Corp.*, 796 F.2d 74, 76 (5th Cir. 1986) ("while we might reach a different result under another standard of review, under the plain error rule we must disagree with [appellant] . . ."); *Reese v. Mercury Marine Division of Brunswick Corp.*, 793 F.2d 1416 (5th Cir. 1986) (clearly improper closing argument, remarks by the trial judge and the exclusion of evidence did not rise to plain error).

Furthermore, a review of the authority cited by the *Nowell* panel in its opinion indicated that, contrary to petitioners' contentions, *see* petition at 7, the panel did apply the proper standards. *See, e.g., Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The doctrine is not a routine by-pass to Rule 51. . . ."); *Industrial Development Board v. Fuqua Industries, Inc.*, 523 F.2d 1226, 1240 (5th Cir. 1975) ("Once the jury demonstrates that it is concerned with an issue [by sending a note requesting that the charge be re-read] it cannot be said that a clearly erroneous instruction was not prejudicial."); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371 (5th Cir. 1969) ("The determination of whether justice has miscarried is not always easy. The criterion is certainly not whether the court approves or does not disapprove the result of the case.") Based upon its application of these standards, the panel's decision cannot be assailed.

The panel found that the jury had been read two inconsistent instructions stating diametrically opposed

propositions of law which cut to the very heart of a material issue in the case (the application of Mississippi's comparative negligence statute, *see* Miss. Code Ann. § 11-7-15 (1982)). The respondent did object to the instruction as given, albeit on other grounds; therefore, it cannot be said that respondent silently approved of the instruction or waived its objection. *See Johnson v. United States,* 318 U.S. 189, 199-201 (1943). The error was an obvious one, *see* Appendix at App. 1-2, and since the jury manifested its confusion by requesting a copy of the instructions, which request was denied, *see Industrial Development Board v. Fuqua Industries, Inc.,* 523 F.2d 1226, 1240 (5th Cir. 1975), the panel did not abuse its discretion in deciding that the erroneous instruction had a prejudicial impact on the jury. The verdict was properly vacated and certiorari is not warranted on this issue.

ARGUMENT III

The Fifth Circuit Did Not Err In Setting Aside The General Verdict And Ordering A Complete New Trial—Retrial Of All Issues Is Necessary To Preserve Universal's Right to Trial By Jury.

Petitioners contend that the Fifth Circuit infringed upon petitioners' Seventh Amendment rights by vacating the general verdict and ordering a new trial on all issues. Petitioners' argument is that the general verdict conclusively established Universal's liability and that the Seventh Amendment forbids a second jury from readdressing that issue. However, as established precedent demonstrates, anything less than a complete retrial of this

case would infringe upon *Universal's* Seventh Amendment right to trial by jury.

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court addressed the issue of whether the Seventh Amendment allowed the retrial of less than all of the issues of a cause. Although the Court found that partial retrials did not *per se* offend the Seventh Amendment, it cautioned against their liberal use: "Where the practice permits a partial new trial, it may not be resorted to unless it *clearly* appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500 (emphasis added).

In *Gasoline Products* the appeals court had ordered that defendant's counterclaim be retried, but only on the issue of damages. However, the Supreme Court disagreed, saying the general verdict on the counterclaim was inconclusive on the liability issue. Furthermore, the issues of liability and damages were not separable: "Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

Recent cases applying *Gasoline Products* have refused to order a partial retrial of damages alone if it appeared that the verdict reached was the result of a compromise on damage and liability or if it appeared that error on the damages issue may have affected the liability determination. *See, e.g., Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576-78 (3d Cir. 1983) (complete

retrial ordered when the jury's inconsistent answers to "special questions," apparent jury confusion and a comparison of the damages awarded and the damages sought indicated a possible compromise verdict); *Mekdeci v. Merrell National Laboratories,* 711 F.2d 1510, 1513-15 (11th Cir. 1983) (compromise verdict indicated when damages awarded were insufficient, the liability issue was hotly contested, the jurors' communications with the judge indicated their focus on the liability issue and an Allen charge may have prompted a hasty decision); *Ouachita National Bank v. Tosco Corp.,* 686 F.2d 1291, 1299 (8th Cir. 1982) (trial court's action in ordering an entire new trial upheld when comparison of damages sought and damages awarded indicated that the jury possibly felt plaintiff was also at fault); *cf. Franchi Construction Co. v. Combined Insurance Co. of America,* 580 F.2d 1, 8 (1st Cir. 1978) ("The trial court's emphasis on the possible economic benefit to be realized in conducting a resumed trial must yield to the injustice resulting here in trying interconnected damages issues separately to different juries."). *See generally* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2814 (1973).

Partial retrials are more likely to be had in instances where detailed special interrogatories are submitted to the jury and the court can be certain that the issues not to be retried are definitely settled and not tainted by the error requiring the remaining issues to be reexamined. *See, e.g., Martell v. Boardwalk Enterprises, Inc.,* 748 F.2d 740, 755-56 (2d Cir. 1984) (partial retrial appropriate since special interrogatories were propounded, the court's instructions on the use of the special interrogatories were clear and the appeals court had no basis for supposing

that the jury confused the issues); *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1050 (2d Cir. 1984) (" 'when a jury arrives at its decision by detailed special verdicts, enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict, a partial retrial may be in order . . .' " (*quoting Akermanis v. Sealand Service, Inc.*, 688 F.2d 898, 906 (2d Cir. 1980), *cert. denied*, 461 U.S. 927 (1983)), *cert. denied*, 469 U.S. 854 (1984).

Under the *Gasoline Products* line, it is clear that the Fifth Circuit's discretionary decision to order a complete retrial was correct. In the instant case liability was hotly contested; Universal defended on the theories that the drum involved was not Universal's, *see Nowell*, 792 F.2d at 1311-12, 1314-15, and that Universal had no duty to warn Donald Joe Nowell because he and Wendell Edwards both appreciated the risk involved in welding on an empty 55-gallon drum without first checking to make sure it was clean, *id.* at 1312-13. The jury was given conflicting instructions and its confusion was manifested in a request for a copy of the instructions, *id.* at 1316. While the million dollar verdict returned was substantial, petitioners argued in their petition for rehearing that undisputed evidence justified a verdict two and one-half to six times as high. *See* Appendix at App. 8-9. If the jury was persuaded by the erroneous instruction that it must return *all* of plaintiffs' damages, then under petitioners' interpretation of the evidence the $1,000,000 verdict would have to represent a compromise. In light of these circumstances and since the verdict was a general one which did not specifically resolve the issue of comparative fault, the Fifth Circuit panel could not clearly say that the issue of Uni-

versal's negligence was so distinct from the issues of Nowell's contributory fault and damages that the retrial could have been limited to these issues.

The only two cases petitioners cite on their partial retrial issue are not persuasive. In *City of Jackson v. Copeland*, 490 So. 2d 834 (Miss. 1986), while it is not even clear whether an entire or partial retrial was ordered, *id.* at 839, it is clear that the Seventh Amendment issue was not specifically addressed. Likewise, *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 113 (1981), is not controlling. Since contributory negligence was not available as a defense in *Rodrigue* and liability was clearly established, the only remaining issue was the amount of damages to be awarded. Such is not the case here.

In their brief petitioners also contend that they were denied their due process "opportunity to be heard" on the partial retrial issue because the Fifth Circuit denied their Petition for Rehearing without oral argument or a written opinion. However, due process does not require that an appellate court hear oral arguments before deciding an issue, even where substantial questions of law are involved. *See, e.g., Dredge Corp. v. Penny*, 338 F.2d 456, 462 n.14 (9th Cir. 1964); *In Re Citizens Investment Trust*, 25 B.R. 1005, 1008 (D. Mass. 1982). Likewise, there is no constitutional requirement that a written opinion be issued in this appeal. *See, e.g., Harris v. Rivera*, 454 U.S. 339, 344 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are exceptions rather than the rule." (footnotes omitted); *Sumner v.*

Mata, 449 U.S. 539, 548 (1981) ("a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit."); *Taylor v. McKeithan,* 407 U.S. 191, 194 n.4 (1972) ("the court of appeals should have wide latitude in their decisions of whether or how to write opinions."); *Riley v. Lockhart,* 726 F.2d 421 (8th Cir. 1984) (state court was not required to issue a written opinion when it denied the petitioner's motion collaterally attacking his conviction); *Furman v. United States,* 720 F.2d 263, 264 (2d Cir. 1983) ("The premise underlying Furman's appeal is that the parties' contentions on appeal have been given inadequate consideration whenever the appellate court's decision was not accompanied by a written and published opinion. The premise has no sound basis in law or in fact."); *Westside Property Owners v. Schlesinger,* 597 F.2d 1214, 1216 n.3 (9th Cir. 1979) (the district court had no obligation to address every legal or factual argument made by the parties).

Despite the fact that the Fifth Circuit panel denied the petition without an opinion, petitioners had ample opportunity to brief the issues on rehearing, *see* Appendix at App. 5, and leave was granted to both the Association of Trial Lawyers of America and the Mississippi Trial Lawyers Association to file *amicus curiae* briefs on petitioners' behalf. *See* Appendix at App. 6-7. Furthermore, there is no question that the panel members were well-acquainted with the applicable standards regarding partial retrials, as a review of their recent opinions on this exact issue demonstrate. *See Colonial Leasing of New England, Inc. v. Logistics Control International,* 770 F.2d 479 (5th Cir. 1985) (*per curiam*); *Brooks v. Great Lakes Dredge-Dock*

Co., 754 F.2d 539 (5th Cir. 1985) (Jolly, J.). Accordingly, there was no error and there is no reason to grant certiorari on this ground.

ARGUMENT IV

The Petitioners Have Failed To Identify Any Due Process Violations.

The petitioners' final argument is merely a combination of the three prior arguments with the underlying theme being that the appeals court denied petitioners' due process rights when it 1) decided the appeal on an issue not raised in the notice of appeal, 2) did not give the parties a pre-opinion opportunity to brief the issues, 3) made certain erroneous findings of fact in its opinion and 4) denied petitioners' motion for rehearing on the plain error and partial retrial issues without a written opinion. Since contentions 1, 2 and 4 have already been addressed in the other arguments of the brief, Universal will address only contention 3 in this argument.

The due process clause does not assure petitioners of a favorable judicial decision, an error-free decision or even one that is just; instead, due process only guarantees that the decision will be reached by a process that is fair. *See, e.g., Brault v. Town of Milton*, 527 F.2d 730, 739 (2d Cir. 1975) (*on reh'g en banc*); *United States v. Wallace*, 448 F. Supp. 164, 166 (E.D. Va. 1978); *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 68 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979). If the appeals court did make any errors in its factual findings, that is regrettable. However, this Court is not a forum for the correction of errors.

See Board of Education v. McCluskey, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting). Furthermore, petitioners had ample opportunity to and did point out the alleged error to the Fifth Circuit in their Petition for Rehearing. *See* Appendix at App. 8-9. Perhaps the panel's failure to issue a supplemental opinion on this point indicated that the change suggested in the factual finding would not have altered the panel's application of the plain-error doctrine. This is the most reasonable inference as the only specific error which petitioners have identified, *see* petition at 23, is not serious enough to alter the outcome of this case or to warrant the issuance of a writ of certiorari on this ground.

—o—

CONCLUSION

Universal Electric Company respectfully suggests that the Petition for Writ of Certiorari be denied. The decision of the court of appeals in this diversity case comports with well-settled federal statutory and case law on plain-error, partial retrial and due process, and does not present an important question of federal law which would merit the granting of certiorari and the reexamination of these principals. The portion of the appeals court's opinion by which petitioners are aggrieved was based upon an erroneous instruction unique to this case and involving the proper application of the Mississippi comparative negligence statute. Since the petitioners can make no argument that the instruction isolated by the court of appeals was

not clearly and obviously erroneous, certiorari is inappropriate under Rule 17 and should not be granted.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 24 1985
CLARENCE A. PIERCE, CLERK
BY DEPUTY

DONALD JOE NOWELL, II, BY
AND THROUGH HIS MOTHER AND NEXT FRIEND,
PAMELA MAE NOWELL; PAMELA MAE NOWELL;
AND THE ESTATE OF DONALD JOE NOWELL,
BY AND THROUGH PAMELA MAE NOWELL,
ADMINISTRATRIX

PLAINTIFFS

VS.

CIVIL ACTION NO. E82-0094 (L)

UNIVERSAL ELECTRIC COMPANY

DEFENDANT

U.S. COURT OF APPEALS
RECEIVED
MAY 28 1985
NEW ORLEANS, LA.

INSTRUCTION NO. _____

The Court instructs the jury that in the event that you find that the defendant, Universal Electric Company, through its employees was guilty of negligence in either of the following manners:

1. By disposing of the barrels by selling to ~~an individual, namely,~~ Wendell Edwards, for use by Donald Joe Nowell, if you first find that such act is negligence.

2. By failing to completely and adequately warn and instruct individuals who would come in contact with the barrels on the safe and non-hazardous use of the barrels, how to make the barrels safe for use, and as to the continued hazardous condition of the barrels, if you find that such was negligence.

3. By failing to re-lable the barrels so as to plainly, obviously, and in a manner calculated to catch the attention of those who are to come into contact with the barrels, that Universal Electric Company had emptied the barrels of its contents, had not cleaned or otherwise made the barrels safe, and that it was still in a hazardous condition, if you find that that was negligence.

4. By failing to eliminate the hazard of explosion by destroying the barrels, cutting the top out of the barrels, or by cleaning the barrels, if you find such was negligence,

and if you further find from a preponderance of the credible evidence that Donald Joe Nowell was injured as a proximate result or contributing result of said negligence on April 29, 1981, and subsequently died as a result of said injuries on August 28, 1981, then it is your sworn duty to return a verdict for the plaintiffs in an amount adequate to compensate the plaintiffs for all damages sustained.

App. 2

Restatement of Torts 2nd, §388
Gordon v. Niagra Machine and Tool Works, 574 F.2d 1182 (5thCir. 1978); Borel v. Fireboard Paper Products Corporation, 493 F.2d 1076 (5thCir. 1974); Shell Oil Company v. Gutierrez, 581 P.2d 271 (Ariz.App. 1978); Spruill v. Boil-Midway, Inc., 308 F.2d 79 (4thCir. 1962); Buck v. Wicks Corp., 378 NE.2d 964 (Mass. 1978); Aderson v. Klix Chemical Company, 256 Or. 199 472 P.2d 806 (1970); Gulf Refining Company v. Williams, 185 S. 234 (Miss. 19); D'Arienzo v. Clairol, 310 A.2d 106 (N.J. 1973) 6 Am Jur Proof of Facts 2d 175, §2; Miller v. New Zealand Insurance Company, 98 S.2d 544 (La.App. 1957); Gronlie v. Positive Safety Manufacturing Company, 212 NW.2d 756 (Mich. 1973); Gall v. Union Ice, 239 P.2d 48 (Cal. 1971); J. C. Penney Company v. Morris, 173 MS 710, 163 So. 124 (1935); Cadillac Corporation v. Moore, 320 So.2d 361 (Miss. 1975); Fiorentino v. Staley Mfg. Co., 416 NE.2d (Mass.App. 1981)

APPENDIX II

The pertinent text of the statutory provisions and court rules involved are as follows:

1. 28 U.S.C. § 2111

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Miss. Code Ann. § 11-7-15

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

3. Fed. R. Evid. 103(d)

> Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

4. Sup. Ct. R. 34.1(a)

> A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:
>
> > (a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be iden-

tical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estates of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiff-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed July 11, 1986)

ORDER:

IT IS ORDERED that appellee's motion for leave to file a brief not to exceed 25 printed pages on the issues presented in its petition for rehearing and for an extension of time to and including July 23, 1986, within which to file such brief is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed August 11, 1986)

ORDER:

IT IS ORDERED that the motion of the Mississippi Trial Lawyers Association for leave to file an amicus curiae brief in support of appellee's petition for rehearing is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed August 11, 1986)

ORDER:

IT IS ORDERED that the motion of the Association of Trial Lawyers of America for leave to file an amicus curiae brief in support of appellee's petition for rehearing is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX VI

We submit, as we will later argue in detail, that the undisputed evidence of the full damages sustained by Nowell is some multiple between 2.5 and 6 times greater than the one million dollar verdict returned by the jury. Therefore, Nowell urgently contends that the facts regarding the jury's determination of the amount of damages do not justify the application of the "Plain Error" exception.

I. THE "PLAIN ERROR" EXCEPTION IS NEITHER FACTUALLY NOR LEGALLY APPLICABLE TO THE CASE AT BAR.

Universal did not object to either the first or the second aspect of the District Court's charge discussed by this Court in its opinion—on any ground—much less the ground that the two aspects of the court's charge were in conflict. Ordinarily, the appellant must affirmatively show compliance with the mandatory requirements of FRCP Rule 51 in order to preserve as error a challenge to the District Court's jury charge. The "Plain Error" exception is just that—an *exception!* The courts have alternately noted that the "Plain Error" exception is a "narrow exception" [*Batesole v. Stratford,* 505 F.2d 804, 808 (6th Cir. 1974)] which should be applied "sparingly" and only in "exceptional cases" or under "peculiar circumstances." *Nimrod v. Sylvester,* 369 F.2d 870, 873 (1st Cir. 1966). See also *Delancey v. Motichek Towing Service, Inc.,* 427 F.2d 897, 901 (5th Cir. 1970); *Troupe v. Chicago D & G Bay Transit Company,* 234 F.2d 253, 259-260 (2nd Cir. 1956).

There seem to be three factors affecting the applicability of the "Plain Error" exception.

* * *

CONCERNING THE FIRST FACTOR.

It does not plainly and obviously appear on the face of the record that the jury misapplied the Mississippi comparative negligence rule either from the standpoint of a legal or a factual analysis.

* * *

In view of the fact that the undisputed evidence and uncontested arguments concerning the amount of the Nowells' loss ranged between $2.6 million and $6.0 million there can be little doubt that the jury did not fully compensate the plaintiffs for "all damages sustained" but did, in fact, reduce the amount of their award in proportion to Donald Joe's own ngeligence [sic].

APPENDIX VII

SUMMARY OF ARGUMENT

This Brief shall first propound the contention that no Plain Error existed in the case at bar, and that the Plain Error exception was applied in an overly broad manner.

* * *

As noted by this Court, a failure to object to an offending instruction normally precludes review by the appellate court. The "Plain Error" exception, meant to be a rare cure for unobjected-to error in instructions, is very rarely applied. 9 C. Wright and A. Miller, Federal Practice and Procedure § 2558, page 672 (1971). Of course, application of such an awesome power is rightfully restricted to only the most egregious of errors.

* * *

This Court also cited in its Opinion a string of cases in which is [sic] has applied the "Plain Error" doctrine. On closer inspection, each of these cases can be easily distinguished.

In *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980), the complained of error was raised on appeal by Appellant. Furthermore, the court noted that the verdict in that case reflected a strong possibility that the law of the forum state had not been applied as a result of the faulty instruction. This is readily distinguishable from the case at bar, wherein the sole effect of any possible error would concern the amount of the verdict. Again, the amount of the verdict reflects that the jury followed the proper law of the forum state.